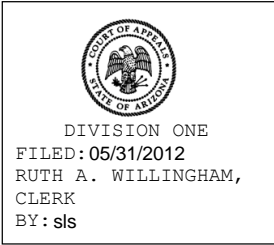


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



ANGELA M. ,) No. 1 CA-JV 11-0250
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, ANGEL G. ,) ARCAP 28)
)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD18168

The Honorable Colleen McNally, Judge

REVERSED AND REMANDED

David W. Bell, Attorney-at-Law Mesa
By David W. Bell
Attorney for Appellant, Angela M.

Thomas C. Horne, Arizona Attorney General Phoenix
By Michael Valenzuela, Assistant Attorney General
Attorneys for Appellee, Arizona Department of Economic Security

K E S S L E R, Judge

¶1 Angela M. appeals the juvenile court's order severing her parental rights with A.G. Angela's rights were severed on

grounds of fifteen months out-of-home placement pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8)(c) (Supp. 2011).¹ For the following reasons we reverse the termination of parental rights and remand this case to the juvenile court to reinstate the dependency proceedings and order mental health family reunification services and other appropriate services as deemed necessary.

FACTUAL AND PROCEDURAL HISTORY

¶12 Angela used methamphetamine for several years before A.G. was born. When Angela found out she was pregnant with A.G., she stopped using methamphetamine, but began again four or five months into her pregnancy. Angela stopped using methamphetamine a few weeks before A.G. was born in 2009.

¶13 At the hospital Angela admitted her history of substance use, and hospital personnel alerted Child Protective Services ("CPS"). The Arizona Department of Economic Services ("ADES") took A.G. into custody and placed A.G. with Angela's mother, where he remained throughout these proceedings.

¶14 Angela voluntarily sought substance abuse treatment, and on June 30, 2009, she entered an intensive residential program at New Arizona Family, Inc. ("NAFI"). The same day a dependency petition based on substance abuse was filed, and on

¹ We cite to the current version of the statute when no revisions material to this decision have occurred.

July 7, 2009, A.G. was found to be dependent with a case plan of family reunification. To facilitate family reunification the court ordered: (1) inpatient substance abuse treatment at NAFI;² (2) outpatient substance abuse treatment; (3) urinalysis testing after completing inpatient treatment; and (4) a parent aide after completing inpatient treatment.

¶15 In connection with NAFI, Angela completed an intake through Magellan Health Services and the Arizona Department of Health Services Division of Behavioral Health Services. The intake revealed that in addition to methamphetamine substance abuse Angela was "presenting concerns" with "Depressive Mood," "Anxiety/Stress," and "Victim of Abuse/Neglect/Violence." She was given an Axis I diagnosis of "Amphetamine and Other Psychostimulant Dependence, Unspecified."

¶16 On August 1, 2009, after one-month of treatment, NAFI administered a psychiatric evaluation. The report indicates that "in the past [Angela] had issues with depression," and tried Zoloft and Effexor. In addition to a diagnosis of "Amphetamine and Other Psychostimulant Dependence, Unspecified" Angela was also diagnosed with a secondary Axis I "Depressive Disorder, not Elsewhere Classified." The assessment concluded

² Although Angela entered this program on her own initiative a week earlier, CPS approved, and the court specifically ordered treatment through NAFI.

that Angela did not need psychotropic medication unless her depression worsened.

¶17 A.G. visited Angela at NAFI, and CPS later allowed A.G. to live there with Angela on weekends. Angela abstained from drugs for four months during inpatient treatment, and she was successfully discharged from NAFI on November 2, 2009. According to her discharge summary, Angela entered treatment to address her amphetamine dependence and depressive disorder.

¶18 With CPS permission, Angela went to live with her mother and A.G., and she began outpatient treatment at NAFI. The CPS case manager's November 30, 2009 progress report to the juvenile court reflects that the target date of family reunification was January 3, 2010. Angela participated in outpatient treatment and remained drug-free for more than two additional months, when she admitted to her NAFI counselor in mid-January 2010 that she relapsed.

¶19 Thereafter, Angela tested positive for amphetamine at TASC on March 10, 2010, and her parent-aide reported that she "admitted to using drugs" in mid-May 2010. Meanwhile, on May 10, 2010, the CPS case manager appeared before the Foster Care Review Board and reported that Angela had *not* had a psychological evaluation. The Board recommended that CPS schedule a psychological evaluation for Angela. A copy of that report was filed with the juvenile court and sent to CPS. The

record contains no indication CPS ever followed up on the report.

¶10 In July 2010, CPS referred Angela to TERROS for outpatient substance abuse treatment. Angela completed an intake through Magellan and admitted that she last used drugs on July 5, 2010. Her treatment plan to attend individual counseling for one month and group counseling to learn coping skills to stay sober was to address her diagnosis of "Amphetamine and other psychostimulant disorder, in remission." During July and August 2010, Angela tested negative for substances through TASC.

¶11 Also in July 2010, Angela moved into a halfway house called Stepshouse/Center for Healing, Inc. At Stepshouse she participated in urinalysis testing and consistently tested negative for substances. Angela successfully participated in a fifteen-week sober living program for which she received a certificate on October 15, 2010.

¶12 At the November 8, 2010, Foster Care Review Board hearing, the Board was concerned because CPS did not attend the review and it asked the juvenile court to find out whether Angela had a psychological evaluation. A copy of that report was filed with the juvenile court and sent to CPS. The record contains no indication CPS followed up on the report.

¶13 Angela voluntarily entered treatment at "New Direction" in late December 2010. Angela told her substance abuse counselor at New Direction that the last time she used methamphetamine was in December 2010. Angela consistently participated in groups and she did well in groups for a couple of months. The counselor testified that Angela completed the program and would have graduated in April 2011, but admitted to him right before graduation that she used. Although the substance abuse counselor never asked Angela about mental health issues, had he known Angela was depressed he would have changed his treatment plan.³

¶14 In January 2011, ADES successfully petitioned the juvenile court to change the case plan to severance and adoption. ADES filed a motion to terminate Angela's parental

³ At the termination hearing the counselor testified that Angela gave him the names of her CPS caseworkers and he called CPS and left several messages but his calls were never returned. He testified that the only contact he had with CPS was through sending his progress reports to Angela's caseworkers.

rights on January 19, 2011 pursuant to A.R.S. § 8-533(B)(8)(c) because A.G. was in out-of-home placement for fifteen months or longer.

¶15 At a March 29, 2011 pretrial conference, the CPS case manager testified that she did not know about all the programs Angela was involved in over the last six months. At an April 15, 2011 court hearing, in connection with appointing a guardian-ad-litem the court inquired if Angela had undergone a psychological evaluation and the CPS case manger responded she did not know.⁴

¶16 In late May 2011, Angela completed another intake at TERROS. The intake form indicated that she was there for substance abuse and mental health counseling. Angela was given a primary diagnosis at that time as "unspecified psychosis" and a secondary diagnosis of "Amphetamine or related acting sympathomimetic abuse, in [remission]."

¶17 Angela attended individual counseling on May 23 and her plan was to focus on "general mental health

⁴ It appears that CPS did not have Angela's NAFI records at this time because ADES later sought a court order for the records. See ¶ 18 *infra*.

issues/concerns.”⁵ Although Angela attended some groups, she missed many others.

¶18 On June 14, 2011, two weeks before the severance trial was initially scheduled to begin, ADES sought a court order for Angela’s treatment records asserting that she had a history of mental health issues and that the records were “*necessary so ADES can identify and provide appropriate reunification services*” and determine if Angela can care for A.G.⁶ (Emphasis added.) On June 23, 2011, Angela’s NAFI records were disclosed to ADES.⁷

¶19 On July 21, 2011, Angela tested positive for amphetamines at TASC. Angela voluntarily checked herself into St. Luke’s hospital because she “knew something was wrong with [her] and [her] mental stability wasn’t right.” On July 25, 2011, Angela was given an “Emergency Psychiatric Evaluation” administered by Recovery Innovations of Arizona, Inc.

⁵ Documentation from TERROS client progress notes during that time indicates: “Objective 1: Client will attend a psychiatric evaluation & medication management for mood stabilization. Client will be compliant with medication.” Documentation from TERROS group progress notes during that time indicates: “Goal 1: Angela will attend the co-op group to learn 8 coping skills for mental health and substance abuse concerns.”

⁶ The motion also stated that ADES “has been unable to obtain written consent,” but did not state if or when written consent was requested from Angela.

⁷ The contested severance hearing was originally set for June 28, 2011 and July 11, 2011, but a change of judge for cause was granted on June 27, 2011.

Psychiatric Recovery Center West that indicated she had an Axis I diagnosis of psychosis. Angela tested negative for substances and was depressed; she had paranoid ideations and was hearing voices. Recovery Innovation of Arizona, Inc. referred Angela to TERROS because she was presenting concerns with depression, stress, and substance abuse.

¶20 In August 2011, Angela started regularly participating in the TERROS L.A.D.D.E.R program until October 2011.⁸ From August 2011 to October 2011 Angela tested negative for substances at TASC. Angela obtained employment at a restaurant in September 2011 and was working eighteen to twenty-two hours per week, and she applied for another higher-paying position.

¶21 CPS authorized a psychological evaluation which was administered on October 26, 2011; the results were unknown to CPS at the time of the termination hearing.

¶22 After the termination hearing held on October 31, and November 4, 2011, the juvenile court severed Angela's parental rights to A.G. based on fifteen months' out-of-home care pursuant to A.R.S. § 8-533(B)(8)(c). The court found that:

[a]lthough the record reflects that [Angela] would benefit from mental health treatment to address her depression, it also reflects

⁸ "L.A.D.D.E.R (Life-Affirming Dual Diagnosis Education and Recovery) The TERROS LADDER program helps people who have mental health and substance abuse challenges." Terros, <http://www.terros.org/ladder.php> (last visited May 22, 2012).

that she has been unable to demonstrate sustained sobriety. Without sustained sobriety, she is unable to meet her obligations as a parent and is unlikely to be able to benefit from mental health treatment. Given these circumstances, there is a substantial probability that [Angela] will be unable to exercise proper and effective parental care and control in the near future.

The court then determined that ADES "made diligent efforts to provide services . . . to address these issues and to assist with family reunification." Angela timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and -2101(A)(1) (Supp. 2011).

DISCUSSION

¶123 Angela argues that: (1) the court erred by finding ADES made diligent efforts to provide reunification services because despite evidence that Angela was diagnosed with depression, ADES did not provide services for depression; (2) the court's finding that she would not be able to exercise proper and effective parental control in the near future was erroneous; and (3) severance was not in A.G.'s best interest.⁹

¶124 The State argues that: (1) because ADES never alleged that depression caused A.G. to be in out-of-home placement and it "did not believe that [Angela's] mental condition prevented

⁹ Because we agree ADES did not prove by clear and convincing evidence that it made diligent efforts to provide appropriate reunification services, we need not reach Angela's other arguments.

her from being an effective parent, mental-health treatment would not have been an appropriate service;" (2) Angela did not ask for additional services and withheld information regarding her depression including not signing a release for her NAFI records; and (3) even if the case manager would have known about Angela's depressive disorder diagnosis at NAFI, Angela's depression was not severe enough to warrant treatment.

¶25 We review an order severing parental rights for clear error. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). This Court views the evidence in favor of supporting the juvenile court's findings, but we are not required to accept findings of fact unless they are supported by reasonable evidence. See *id.* (citing *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000)); see also *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 25, 152 P.3d 1209, 1213 (App. 2007) ("To the extent findings are not adequately supported by the record, they are clearly erroneous.").

¶26 The State bears the burden to prove each element of A.R.S. § 8-533(B) by clear and convincing evidence. See A.R.S. §§ 8-537(B) (2007), -863(B) (2007); see also *Kent K. v. Bobby M.*, 210 Ariz. 279, 283, ¶ 19, 110 P.3d 1013, 1017 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982)). On this record, we cannot agree that the State met its burden of proof

with respect to the requirement that it made "diligent efforts to provide appropriate reunification services" under A.R.S. § 8-533(B)(11)(b).¹⁰ See generally *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 19, 219 P.3d 296, 303 (App. 2009) (noting that ADES has "statutory and constitutional obligations to make reasonable efforts to reunify [a] family").

¶127 At the termination hearing CPS testified that it did not order a mental health evaluation or provide mental health treatment earlier in this case because Angela first needed to obtain 60 to 90 days of sobriety before such services would have been of value. However, the record reflects that such periods of sobriety occurred during the dependency in 2009 and again in 2010. Indeed, in its answering brief, the State concedes that from July 2009 to January 2010 Angela maintained six months' sobriety, and then again from mid-July 2010 to mid-October 2010 she abstained from drugs for three months. There is no evidence that CPS considered a mental health evaluation or treatment during these periods of time. At the termination hearing, the CPS case worker was still unaware of Angela's negative urinalysis testing at Stepshouse during the fall of 2010,

¹⁰ Although the juvenile court did not specifically find that the services provided were "appropriate" as is required for severance under A.R.S. § 8-533(B)(8)(c), we assume the court made all findings necessary to support its determination.

despite the fact that the documents were disclosed to CPS in early November 2010 and again to ADES in June 2011.

¶128 Nor does the record support ADES's argument that even with the exercise of due diligence CPS could not have known of the need for a mental health examination and treatment earlier. It is undisputed that in May 2010, the Foster Care Review Board recommended that Angela receive a psychological evaluation, and the Board inquired in November 2010 whether this had been done. For unknown reasons, CPS did not respond to these requests. Although the State argues that Angela withheld information regarding her depression and there is some evidence that the NAFI records were not released until June 2011, the CPS case manager testified at the termination hearing that Angela informed her of her depression in either 2009 or 2010, and that the case manager reviewed the NAFI records in May 2011.¹¹ For reasons unclear from the record, CPS was unaware that NAFI

¹¹ The first time the release issue appears in the record is April 2011. It is unclear when if ever the State asked Angela to release the NAFI records or told her they did not yet have her records. It is also unclear why at the November 2011 termination hearing, ADES asserted that it had not seen a psychiatric evaluation in the NAFI records despite disclosure of the file in June 2011, and the case worker's testimony about reviewing the file in May 2011.

diagnosed Angela with a mental health disorder in August 2009.¹² It is also unclear why CPS did not review Angela's NAFI treatment records until May 2011. Although CPS may not have taken notice of these reports and concerns about Angela's mental health, its lack of recognition of the need for mental health treatment for two years after the case was opened resulted in missed opportunities to provide sustained treatment earlier.

¶29 The State argues that even if the case manager would have known about Angela's diagnosis at NAFI, Angela's depression was not severe enough to warrant treatment. The record does not support that argument. The NAFI diagnosis, on which the State relies, does not state Angela does not need mental health treatment, but rather states only that she did not need *medication* unless her depression worsened. In addition, ADES conceded in June 2011 that Angela had a "history" of mental health issues, and that the release of her NAFI records was "*necessary so ADES can identify and provide appropriate reunification services.*" (Emphasis added.) Moreover, the juvenile court specifically found that Angela would benefit from mental health treatment.

¹² The CPS case manager testified that she "went to NAFI, discussed and had a visit with the counselor." The record also reflects that the case manager spoke to NAFI personnel about Angela's case and letting A.G. live with her there.

¶130 ADES did not present evidence that mental health treatment would have been futile, or that such services would have not had a reasonable prospect of assisting Angela in overcoming her substance abuse problems earlier in the dependency, particularly during the sustained periods in which Angela remained drug-free. To the contrary, one of Angela's outpatient substance abuse counselors testified that mental health issues can impact a person's drug use, and Angela's depression could have been one of the reasons she took drugs. Consequently, had the counselor known of Angela's depression, he would have changed her treatment plan. Although the CPS case manager told Angela to go to Magellan for help after Angela reported to her in 2009 or 2010 that she was depressed, the case manager apparently failed to appreciate the significance of this information in considering what services should be provided to Angela at a time when the case plan was still reunification.

¶131 "Although CPS need not provide 'every conceivable service,' it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 37, 971 P.2d 1046, 1053 (App. 1999) (quoting *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994)). While CPS is not required to make futile efforts, it is obliged "to undertake

measures with a reasonable prospect of success." *Id.* at ¶ 34. Here, there is no evidence that had CPS been aware of Angela's sustained periods of remaining drug-free and the indications about her need for mental health treatment, it would have nonetheless determined such services to be futile. This does not mean that every time there is any evidence that a parent may benefit from additional services, ADES must prove that such services were inappropriate, unnecessary, or futile. But here, there was evidence of the need for mental health services early during the dependency, sustained periods of sobriety during which mental health services would have been appropriate under CPS's standards, and mental health services were eventually deemed appropriate at the eleventh hour. Indeed, even the juvenile court found that such services would benefit Angela.

¶32 The record shows, however, that CPS failed to obtain information about Angela's depression and missed opportunities to do so. If CPS had acted on the information it had or was available to it, CPS could have provided appropriate reunification services that would have addressed Angela's depression in conjunction with her substance abuse. On this record we cannot say that ADES met its burden to prove by clear and convincing evidence that it made diligent efforts to provide appropriate reunification services, and the juvenile court erred in so concluding.

CONCLUSION

¶133 For the foregoing reasons, we reverse the juvenile court's order terminating Angela's parental rights, reinstate the dependency, and remand for proceedings consistent with this decision.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

ANN A. SCOTT TIMMER, Presiding Judge

/S/

PATRICIA K. NORRIS, Judge