IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

IN RE TERMINATION OF PARENTAL RIGHTS AS TO S.C.,

No. 2 CA-JV 2023-0137
Filed May 1, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 602(i)(17).

Appeal from the Superior Court in Pima County
No. JD170461
The Honorable Kimberly H. Ortiz, Judge

AFFIRMED

COUNSEL

The Law Office of Lauri J. Owen PLLC, Tucson
By Lauri J. Owen
Counsel for Appellant

Kristin K. Mayes, Arizona Attorney General
By Ken Sanders, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

Pima County Office of Children's Counsel, Tucson
By David Miller
Counsel for Appellee Minor

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Judge Kelly and Judge O'Neil concurred.

E C K E R S T R O M, Judge:

¶1 Kathy C. appeals the juvenile court's November 2023 ruling terminating her parental rights to her son, S.C., born in June 2017, based on chronic substance abuse and length of time in court-ordered care.[1] *See* A.R.S. § 8-533(B)(3), (8)(c). We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the juvenile court's ruling. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, ¶ 13 (App. 2011). In September 2021, the Department of Child Safety (DCS) received a report from Kathy's adult daughter that Kathy was neglecting S.C. According to that report, Kathy was using illegal substances and selling them from her home, with unknown individuals frequently coming and going. The subsequent investigation showed that Kathy's parental rights to seven other children had been severed, with the most recent occurring in May 2016. Kathy has an extensive history of substance use and untreated mental-health issues.

¶3 In December 2021, DCS filed a dependency petition, alleging that S.C. was dependent as to Kathy because she was unable to parent due to neglect and mental-health issues. Kathy refused to provide an initial drug test. Later that month, Kathy was diagnosed with major depressive disorder and generalized anxiety disorder. She was also diagnosed with stimulant dependence. In February 2022, Kathy entered a no contest plea, and the juvenile court adjudicated S.C. dependent as to her. The court set a case plan of family reunification.

[1]The juvenile court adjudicated S.C. dependent as to his putative fathers, James R. and Brian C. The termination of James's and Brian's parental rights to S.C. proceeded separately from Kathy's, and James and Brian are not parties to this appeal.

¶4 DCS offered Kathy a variety of services, including random drug testing, visitation, individual therapy, substance-use treatment and education, parenting classes, medication management, healthy relationships classes, and case management. Kathy participated only sporadically. From April through August 2022, she missed several drug tests and also tested positive for substances—including amphetamine, methamphetamine, and heroin—thirteen times.

¶5 In July 2022, the juvenile court changed the case plan to a concurrent plan of family reunification and severance and adoption. The following month, Kathy was re-approved for therapy after her prior referrals had been closed out due to lack of engagement. Although she consistently visited S.C., her participation in other services did not improve. She checked into an inpatient treatment facility in September 2022 but voluntarily checked herself out the following day. Kathy failed to drug test from September 2022 to May 2023, at which point she tested positive for fentanyl, heroin, and methamphetamine. Kathy maintained that DCS was falsifying the positive results.

¶6 In March 2023, the juvenile court placed S.C. with his putative paternal grandparents—who wanted to adopt him—and his brother. The following month, the court found that Kathy had not complied with the case plan and modified the plan to severance and adoption alone. DCS moved to terminate the parent-child relationship, citing as grounds Kathy's chronic substance abuse under § 8-533(B)(3) and that she had not benefitted from either nine months of court-ordered care pursuant to § 8-533(B)(8)(a) or fifteen months of court-ordered care under § 8-533(B)(8)(c).

¶7 After a contested severance hearing, the juvenile court granted the motion for termination, finding that DCS had established the § 8-533(B)(3) and (8)(c) grounds and that severance was in S.C.'s best interests.[2] This appeal followed.

Standard of Review

¶8 The juvenile court may terminate a parent's rights if it finds by clear and convincing evidence that at least one of the statutory grounds for termination exists and by a preponderance of the evidence that termination of the parent's rights is in the child's best interests. A.R.S.

[2]Having found the other two grounds proven, the juvenile court declined to discuss the § 8-533(B)(8)(a) ground.

§§ 8-533(B), 8-537(B); *Sandra R. v. Dep't of Child Safety*, 248 Ariz. 224, ¶ 12 (2020). Under § 8-533(B)(3), termination of the parent-child relationship is warranted if "the parent is unable to discharge parental responsibilities because of . . . a history of chronic abuse of dangerous drugs . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." Under § 8-533(B)(8)(c), the court may terminate a parent-child relationship if: (1) "[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer"; (2) "the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement"; (3) "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"; and (4) that DCS "has made a diligent effort to provide appropriate reunification services."

¶9 On appeal, we defer to the juvenile court's factual findings because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). Accordingly, we will affirm a severance order if reasonable evidence supports the factual findings and the juvenile court's legal conclusions are not clearly erroneous. *Brionna J. v. Dep't of Child Safety*, 255 Ariz. 471, ¶¶ 30-31 (2023).

Discussion

¶10 Kathy argues that DCS failed to establish each of the elements of § 8-533(B)(3) and (8)(c). She contends that the juvenile court found her "substance use alone equated to adequate proof that [she] was unable to parent/had not remedied the circumstances, and would remain unable to parent in the near future/for a prolonged, indeterminate period." She further maintains that "[n]otably absent" from the court's ruling "is any mention of parental unfitness" or "proof of cause and effect of substance use on parental fitness."

¶11 In support of her argument, Kathy relies on *Sandra R.*, in which the juvenile court terminated the parents' rights to multiple children based on the abuse of one, finding that "a significant nexus existed between J.M.'s abuse and the risk of abuse to J.M.'s siblings." 248 Ariz. 224, ¶ 8. Our supreme court, however, disavowed the constitutional-nexus test and clarified that "to terminate parental rights to children who exhibit no evidence of neglect or abuse, under § 8-533(B)(2), the juvenile court must

find during the parental unfitness inquiry, by clear and convincing evidence, that there is a risk of harm to those children." *Id.* ¶ 17. It nevertheless affirmed the severance order, concluding that the juvenile court had "sufficiently imputed the risk of harm to the other children based on J.M.'s serious injuries and [the parents'] lack of credibility in their assurances that they would insulate their other children from abuse." *Id.* ¶ 31.

¶12 *Sandra R.* does not apply here. It dealt with the ground of neglect or abuse under § 8-533(B)(2). *See Sandra R.*, 248 Ariz. 224, ¶ 1. In this case, we address the grounds of chronic substance abuse and fifteen-months' time in care under § 8-533(B)(3) and (8)(c), respectively. *Sandra R.* also dealt with the attribution of the risk of harm to multiple children—another element not present here, where we are concerned only with S.C.

¶13 Our supreme court has determined that the grounds listed in § 8-533(B) generally "establish parental unfitness by showing a parent's inability to properly parent, a voluntary relinquishment of parental rights, or actions that forfeit a parent's right to contest severance." *Timothy B. v. Dep't of Child Safety*, 252 Ariz. 470, ¶ 13 (2022). It explained that the grounds listed in § 8-533(B)(3) and (8)(c) are "proxies for parental unfitness" and, therefore, constitute findings of such. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶¶ 10-11 (2018). Indeed, the court recently reiterated that imposing "an additional showing of parental unfitness outside § 8-533(B)(8)(c)'s elements" is improper. *Brionna J.*, 255 Ariz. 471, ¶ 27. The juvenile court therefore did not err in failing to make a finding of parental unfitness separate from the statutory grounds.

¶14 Kathy acknowledges that "[n]o reasonable person could dispute that using fentanyl and heroin and other unregulated substances constitutes risky behavior." But she contends that such behavior only placed herself at risk—and therefore does not alone "meet the statutory definition of either neglect or abuse of a child."[3] She reasons that "to allow

[3]Neither § 8-533(B)(3) nor (8)(c) require a showing of neglect or abuse. Kathy seems to be reading the element of neglect or abuse in § 8-533(B)(2), as discussed in *Sandra R.*, into § 8-533(B)(3) and (8)(c). We, however, will not do so. *See Am. C.L. Union of Ariz. v. Ariz. Dep't of Child Safety*, 251 Ariz. 458, ¶ 20 (2021) (when legislature included term in some places and excluded it in others, courts will not read that term into sections from which it was excluded).

a presumption of parental unfitness to be established by proof of a parent's risky behavior" will "vastly, overinclude unintended swathes of the population." And because the juvenile court relied on the same "substance abuse/risky behavior" to terminate her parental rights on both statutory grounds, Kathy maintains that her right to due process was violated.

¶15 But Kathy seems to overlook the full text of the two statutory grounds. Section 8-533(B)(3) requires proof of not only a history of chronic substance abuse but of a resulting inability "to discharge parental responsibilities" and of "reasonable grounds to believe that the condition will continue." Similarly, § 8-533(B)(8)(c) requires, in relevant part, proof that "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." These elements directly address Kathy's concern that, to satisfy a finding of parental unfitness, the parent's "risky behavior" must pose a "risk of harm" to the child.

¶16 In its under-advisement ruling, the juvenile court made findings as to all the elements of both § 8-533(B)(3) and (8)(c), and those findings are supported by the record. Notably, Kathy admitted that she had been "heavily on [drugs]" when she was in her twenties and thirties and that she had used substances "[p]retty much the whole time" S.C. was removed from her care, with methamphetamine being her "drug of choice." Drug test results support her admissions. But Kathy failed to follow through with treatment and failed to show an understanding of how her substance use affects S.C. She instead reasoned that she would be an "appropriate caregiver" for S.C. if she were using drugs "[a]s long as he's not in [her] care" at that time because "you can drink and have children in your care and still function."

¶17 By contrast, the DCS case manager testified that Kathy's substance abuse endangers S.C. because she would be unable to meet his needs given that a child of his age requires near constant care. She further testified that even if Kathy were to use substances only when out of S.C.'s presence, that abuse raised further questions about who would care for S.C. during those times and whether he would know that Kathy was using substances. The case manager also testified that when using substances, Kathy has a history of having outbursts, which could pose an additional threat to S.C. Kathy herself admitted that her drug use negatively affected her mental health. Thus, as the juvenile court found, Kathy's substance use "limits her ability to fully function as a safe parent to a young child."

¶18 Although Kathy testified at the time of the severance hearing that she had been sober since March 2023, drug test results indicated otherwise.[4] Kathy also testified that she was not using any services to stay sober and instead was using a "cold turkey" method from which she had previously relapsed. Reasonable evidence thus shows that Kathy's substance abuse affects her ability to parent S.C. *See* § 8-533(B)(3), (8)(c); *cf. Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, ¶ 25 (App. 2010) ("Where the parent has been unable to rise above the addiction and experience sustained sobriety in a noncustodial setting, and establish the essential support system to maintain sobriety, there is little hope of success in parenting." (quoting *In re N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998))).

¶19 Lastly, Kathy argues that the juvenile court relied on improper evidence to support the severance. Specifically, she points to a preliminary protective hearing (PPH) report, which she argues "contains almost nothing besides hearsay," and certified copies of her prior severances, which she contends "were not timely disclosed." She reasons that the court should not have admitted or relied upon these documents.

¶20 As DCS and S.C. point out, however, the juvenile court admitted the PPH report in June 2023, at a severance hearing as to S.C.'s putative father, James R., not as to Kathy. Indeed, in its under-advisement ruling in this case, the juvenile court detailed the various exhibits admitted during the severance hearing as to Kathy. The PPH report is absent from its recitation.

¶21 As to the certified records of Kathy's prior severances, other than asserting that they "were not timely disclosed," Kathy has not meaningfully supported her argument on appeal.[5] *See Bob H. v. Ariz. Dep't*

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[4]In her reply brief, Kathy claims she completed a hair follicle test that shows she was "negative for all substances." However, based on our review of the record, those test results were not before the juvenile court at the time of its ruling. We therefore do not consider it. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4-5 (App. 1990) (appellate review is limited to record before trial court).

[5]Although Kathy did not object to the certified records in her written objections, she objected at the hearing based on relevance and her "[in]ability to access them" on the juvenile court's computer system. Even assuming the argument were sufficiently preserved below, Kathy has failed to establish reversible error, as described above. *See State v. Lopez*, 217 Ariz.

of Econ. Sec., 225 Ariz. 279, ¶ 10 (App. 2010) (argument waived where appellant "cites no legal authority for how or why the juvenile court erred"). Even assuming the argument were not waived, however, no reversible error occurred. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 19 (App. 2005) ("A trial court has broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice.").

¶22 The certified records are filed under the same case number and are part of the same case file as the one currently before us. Thus, even absent a request from DCS, the juvenile court could have taken judicial notice of them. *See* Ariz. R. Evid. 201(b)-(c); *State v. George*, 98 Ariz. 290, 291 (1965) ("A court should take judicial notice of its own records in a case pending before it . . . ."); *cf. In re Pima Cnty. Juv. Action No. S-828*, 135 Ariz. 181, 184 (App. 1982) (in severance, juvenile court properly took judicial notice of another superior court file). And, in any event, other evidence admitted at the severance hearing separately demonstrated the substance of those records. *See State v. Williams*, 133 Ariz. 220, 226 (1982) (erroneous admission of entirely cumulative evidence constitutes harmless error).

¶23 In sum, reasonable evidence supports the juvenile court's factual findings and its legal conclusions are not clearly erroneous. *See Brionna J.*, 255 Ariz. 471, ¶¶ 30-31. We therefore cannot say the court erred in terminating Kathy's parental rights to S.C.[6]

Disposition

¶24 For the foregoing reasons, we affirm the juvenile court's ruling terminating Kathy's parental rights to S.C.

433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another ground).

[6]Because Kathy does not challenge the juvenile court's best-interests finding, we do not address it. *See Crystal E. v. Dep't of Child Safety*, 241 Ariz. 576, ¶ 6 (App. 2017) ("[W]e adhere to the policy that it is generally not our role to *sua sponte* address issues not raised by the appellant.").