FILED BY CLERK
SEP 21 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ESTHER M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and SHAWN M., Appellees.	2 CA-JV 2011-0024 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD200700135

Honorable Joseph R. Georgini, Judge

AFFIRMED

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Florence
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H O W A R D, Chief Judge.

¶1 Esther M., mother of Shawn M., born in 2009, appeals from the juvenile court's 2011 order terminating her parental rights on the grounds of mental illness or deficiency and length of time in court-ordered, out-of-home care, both six- and nine-month periods. *See* A.R.S. § 8-533(B)(3), (8)(a), (b). Esther challenges the sufficiency of the evidence to support the order. We affirm for the reasons set forth below.

¶2 Before a court may sever a parent's rights, it must find the record contains clear and convincing evidence that at least one of the statutory grounds for termination exists, *see* Ariz. R. P. Juv. Ct. 66(C); *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004), and that a preponderance of the evidence establishes terminating the parent's rights is in the child's best interests, *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). "We will review a juvenile court's termination order in the light most favorable to sustaining the court's decision and will affirm it 'unless we must say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.'" *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009), *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*). If there is reasonable evidence in the record supporting the factual findings upon which the order is based, we will affirm. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 Shawn was removed from Esther's custody just days after his birth in June 2009 because at that time there was an open dependency concerning her three other biological children based on neglect, sexual abuse, and domestic violence. The case plan goal in that dependency had been changed from reunification to severance and adoption

because Esther had not remedied the circumstances that caused those children to remain out of the home since 2007. In the dependency petition it filed as to Shawn, the Arizona Department of Economic Security (ADES) alleged Esther was unable to provide a fit home for him because she had failed to comply fully with her case plan as to the other children.

¶4 Esther did not contest the dependency petition, submitting the matter to the court and in September 2009, the juvenile court adjudicated Shawn dependent as to Esther. The court's findings included that Esther was unable to adequately provide for Shawn; that she had not remedied the circumstances that caused her three other children to remain out of the home; that ADES would be seeking the termination of Esther's rights; and that there was "concern [Esther] is and will continue similar patterns of neglect, which prevents her from safely parenting a newborn child." The court further found Esther's judgment appeared to be impaired because "she is willing to allow her newborn son to reside with an alleged father, although the mother feels that the alleged father 'drinks too much and is abusive.'" The court noted that Esther's probation officer from a criminal matter had recently been to Esther's home and "observed the condition . . . to be 'a disaster,' namely that the mother's home had contained feces on the floor."

¶5 In May 2010, the juvenile court terminated Esther's parental rights to the three older children. The court found reunification services had "been exhausted," Esther had "failed to participate in good faith for the majority of this case," and when she did participate, she "failed to show any benefit and/or change in behavior." Although ADES continued to provide Esther services with respect to Shawn, after a permanency hearing

in June 2010 the court changed the case plan to severance and adoption, directing ADES to file a motion to terminate Esther's parental rights.

¶6 ADES alleged as grounds for terminating her rights mental illness or deficiency and both six- and nine-month length of time in care. After a four-day hearing, the court granted the state's motion. Although in its minute entry the court simply tracked the language of the statute with respect to the elements of each ground, ADES subsequently lodged and the court signed a form of order that identified all of the exhibits that had been introduced at the hearing and contained findings of fact related to each statutory ground and conclusions of law. This appeal followed.

¶7 Esther contends on appeal that there was insufficient evidence that she had substantially neglected or willfully refused to remedy the circumstances that caused Shawn to remain in court-ordered care as required by § 8-533(B)(8)(a) and (b). She points to evidence that she had been compliant with "most of the case plan," adding that she "was in the process of completing the final phase." She also contends there was insufficient evidence to support the juvenile court's termination of her rights on the ground of mental illness or deficiency pursuant to § 8-533(B)(3). She seems to be arguing that psychologist Carlos Vega's diagnosis did not fall within the meaning of mental illness or deficiency but rather described poor decision-making abilities. And, she insists the evidence fell short of showing that her condition, however characterized, prevented her "from discharging parental responsibilities."

¶8 Shawn's out-of-home placement is intertwined with Esther's mental illness. We, therefore, begin with the sufficiency of the evidence to support the termination of her rights on the ground of mental illness. The juvenile court correctly found Esther had

been diagnosed with dysthymic disorder (depression) and personality disorder. Consistent with the language of § 8-533(B)(3), the court further found that because of the mental illness, she is unable to discharge parental responsibilities and that this condition will continue for a prolonged and indeterminate period of time. The court specified the services Esther had been provided to address these disorders but found she had not benefitted from them.

¶9 Esther concedes there was evidence, primarily through Vega's report and testimony, that she has a mental disorder but she argues a disorder is neither a mental illness nor mental deficiency. First, the legislature must have intended to include more than "mental illness" because it included the term "mental deficiency." *See Adrian A. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 12, 158 P.3d 225, 229 (App. 2007) (acknowledging appellate court's "reluctance to interpret a rule or statute in a manner that renders any part of it superfluous"); *see also In re Maricopa County No. MH 2001-001139*, 203 Ariz. 351, ¶ 17, 54 P.3d 380, 383 (App. 2002) ("A cardinal rule of statutory interpretation is to avoid, if possible, an interpretation that renders superfluous any portion of a statute.").

¶10 Second, Esther's argument hinges upon a semantical distinction that is without a difference. In *In re Maricopa County Juvenile Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 182-85, 692 P.2d 1027, 1031-35 (App. 1984), Division One of this court rejected a parent's argument that § 8-533(B)(3) was unconstitutionally vague and subject to arbitrary application because there is no definition of mental illness or deficiency in Title 8 relating to child welfare. The court held "that the term 'mental illness' under the statute is defined as 'a substantial mental condition which renders the

person unable to discharge parental responsibilities and which condition is likely to continue for a prolonged indeterminate period.'" *Maricopa Cnty. Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. at 184, 692 P.2d at 1033. The court added that it was not necessary for the statute to define the term or provide a "checklist of every mental illness that will cause a termination of parental rights." *Id*. at 185, 692 P.2d at 1034. The court also pointed out that the experts in that case had used the terms mental disorder and mental illness interchangeably. *Id*. at 186. 692 P.2d at 1035.

¶11 As the court concluded in *Maricopa County No. JS-5209 and No. JS-4963*, the proof of the standard established can properly be provided by expert testimony, 143 Ariz. at 184, 692 P.2d at 1033, as it was here. Based on the evidence presented, as discussed below, the juvenile court readily could find Esther suffers from mental disorders. And a personality disorder that affects a parent's ability to parent is a mental illness for purposes of this statute. *See In re Yavapai Cnty. Juv. Action No. J-9956*, 169 Ariz. 178, 179, 818 P.2d 163, 164 (App. 1991). Indeed, during cross-examination Vega was asked whether a personality disorder is a mental illness. He responded, "Yeah. Well, it's a mental disorder. We've gone through this before. It's a mental disorder. . . . So—so, yeah, I guess." The evidence supported the court's finding that Esther's mental conditions deleteriously affected her ability to parent.

¶12 Vega initially evaluated Esther in 2007 in connection with the dependency and severance proceedings involving Esther's three older children. He concluded she suffered from a dysthymic disorder in combination with a personality disorder and that she showed "salient features of paranoid, borderline, and dependent traits." He evaluated her again on September 3, 2009, in this proceeding, and his evaluation was essentially the

same. He noted Esther had four children by three different fathers, commenting in his 2009 report that getting pregnant by Shawn's father supported his prediction in 2007 that "history would repeat itself."

¶13 Vega also noted that like Esther, Shawn's father was "embroiled with" Child Protective Services (CPS), his rights to his children having been severed, yet in the midst of this they decided to have a child together. Vega testified Esther's prognosis was very poor and her condition would continue for an indeterminate period of time, longer than one year but possibly as long as five. He added she had not benefitted from services she had received and opined it would be futile to offer additional services. Vega explained that because of the personality disorder, Esther's ability to empathize is somewhat impaired and her thinking is distorted, which results in "enduring pattern[s]" of behavior. Instead of acting with rational thought, he stated, a person with such a disorder engages in conduct based on distortions and impulses. He opined that just as Esther had been unable to provide a stable and nurturing environment for her other children, she would not be able to do so with then sixteen-month-old child Shawn. When asked whether the fact that Esther was pregnant with her fifth child at the time of the hearing affected his diagnosis, Vega responded that it confirmed that diagnosis, illustrating the pattern he had described and making it "almost [a] textbook example" of a person with these disorders.

¶14 Because we conclude there was ample evidence supporting the juvenile court's termination of Esther's parental rights on the ground of mental illness, we need not address the sufficiency of the evidence as to the remaining grounds. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 12, 995 P.2d 682, 685 (2000). Nevertheless,

we conclude there was sufficient evidence to support the court's finding that Esther had substantially neglected or willfully refused to remedy the circumstances that caused Shawn to remain out of the home pursuant to court order, justifying the termination of her rights based on both six-month and nine-month out-of-home placement. We note, in particular, the supporting testimony of CPS case manager, Lee Eastman. She testified Esther had substantially neglected or willfully refused to remedy the circumstances that caused Shawn to remain in foster care by failing to avail herself fully of the many services Eastman had offered her, missing parenting classes, individual counseling, and visitation with Shawn.

¶15 As we previously stated, Esther's three older children had been removed from her custody because she had been unable to care for them and had failed to protect her daughter Selena from being sexually abused. Despite a panoply of services, Esther did not change the circumstances that caused those children to remain out of the home, resulting in the termination of her rights, which this court affirmed on appeal. *Esther v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2010-0064 (memorandum decision filed Nov. 4, 2010). Instead, Esther developed a relationship with Shawn's father, who had already been involved with CPS and had lost custody of his own children. Esther did not fully comply with the case plan for her reunification with Shawn and she had not benefitted from the services she did receive so that she could provide a stable environment for him any more than she had for her other children. Instead, she became pregnant a fifth time, demonstrating she had not changed her behavior patterns.

¶16 In her opening brief on appeal, Esther relies primarily on her own testimony and her insistence that she has improved and benefitted from services. But we

do not reweigh the evidence on appeal, rather, we defer to the juvenile court with respect to any 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." *Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945. The juvenile court must decide, after exercising its discretion to determine witnesses' credibility and weigh the evidence presented, whether the evidence establishes clearly and convincingly that at least one statutory ground for severing a parent's rights exists. *Id.*; *see also Michael J.*, 196 Ariz. 246, ¶ 12, 995 P.2d at 685. And to the extent there were conflicts in the evidence in this regard, it was for the juvenile court, not this court, to resolve. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205.

¶17 Finally, we reject Esther's contention that there was insufficient evidence to support the juvenile court's finding that termination of her parental rights to Shawn was in his best interest. First, we agree with ADES that Esther utterly failed to support this argument with citations to the record and authority for what appear to be assertions as a matter of law. We may regard her as having abandoned this claim. *See* Ariz. R. Civ. App. P. 13(a)(6); Ariz. R. P. Juv. Ct. 106(A) (incorporating above provision for "appeals from final orders of the juvenile court"). Second, there was in any event an abundance of evidence establishing that Shawn is bonded with the foster parents with whom he had been placed since birth and that they wish to adopt him. The evidence established he needs permanency and stability, and that Esther is unable to care for him. *See James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998) (to establish severance in child's best interests, "the court must find either that the child will

benefit from termination of the relationship or that the child would be harmed by continuation of the relationship").

¶18 For the reasons stated, the juvenile court's order terminating Esther's rights to Shawn is affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge