FILED BY CLERK
JUN 15 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE PIMA COUNTY MENTAL HEALTH NO. MH 7256-3-09	2 CA-MH 2011-0001 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Honorable Amy Z. Hubbell, Court Commissioner

AFFIRMED

Community Partnership of Southern Arizona
By Kathleen Dostalik — Tucson
Attorneys for Appellee

Ann L. Bowerman — Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 In this appeal, appellant challenges the trial court's order, granting the Petition for Continued Treatment of a Gravely Disabled Person, pursuant to A.R.S. § 36-543(G), filed by Community Partnership of Southern Arizona (CPSA). She contends the court erred when it denied her motion for a directed verdict, arguing there was insufficient evidence she is gravely disabled under A.R.S. § 36-501(16). She also argues the court erred because it failed to address the specific requirements of § 36-543(H)(1), (2) and (3) and shifted the burden from the petitioner to her to prove the elements of the statute by clear and convincing evidence. CPSA has filed a notice stating its intent not to file an answering brief.

¶2 In August 2010, CPSA filed a petition pursuant to § 36-543(G), requesting continued treatment of appellant, a gravely disabled person. CPSA attached to the petition the report of Dr. Elizabeth Fitzpatrick, which Dr. Fitzpatrick had prepared in accordance with § 36-543(D) and (F). Appellant objected and requested a hearing pursuant to § 36-543(G).

¶3 At the hearing on September 14, Dr. Fitzpatrick testified that appellant required assistance with her medications and that personnel at the boarding house where she lives "make sure she's compliant with medications." She testified that about a year earlier in September 2009, appellant had not been getting the help she needed to conduct the activities of daily living, or ADLs, but that in her current situation, "[t]hey cue her to complete her ADLs and . . . they also prompt her to take her medications." After appellant's case manager, Jacqui Placencio, from Cope Behavioral Services, testified about various tasks appellant was able to do on her own and stated appellant kept her medications in her room and takes them and follows through with services, appellant

moved for a directed verdict. She argued CPSA had failed to establish by clear and convincing evidence that she was gravely disabled. The court denied the motion.

¶4 No additional evidence was presented. The court granted the petition, finding that appellant "does continue to be gravely disabled and that there is no suitable alternative at this time that's been presented to the Court that would be an alternative to court-ordered treatment." The court added, "It does not appear that voluntary treatment would be appropriate." In addition, the court stated the following:

> The Court is persuaded that the patient has been unable to care for her basic medical needs and requires the assistance of a case manager and the place where she lives to provide for those basic medical needs, as well as her meals and her medication monitoring, that those have all resulted in her being in quite a different situation than she was in when she was originally evaluated a year ago. And there's just no evidence that she would voluntarily seek medical treatment for these kinds of issues she has or be able to provide for herself adequately without the court order.
>
> There's no evidence that any of [appellant's] family members are prepared to have her.
>
> . . . .
>
> [I]n the absence of that evidence, the Court is going to find that the court-ordered treatment is the appropriate . . . treatment.

¶5 We review an order for involuntary treatment to determine if there is substantial evidence supporting the ruling. *In re Maricopa County Mental Health No. MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009). And, we view the evidence in the light most favorable to affirming the court's ruling. *Id.* Unless the factual findings upon which the court's order is based are clearly erroneous or

unsupported by substantial evidence, we will not disturb the ruling. *See In re Maricopa County Mental Health No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995). The evidence supporting an order for involuntary treatment must be clear and convincing. A.R.S. § 36-540; *see also In re Maricopa County Mental Health No. MH 2007-001236*, 220 Ariz. 160, ¶ 15, 204 P.3d 418, 423 (App. 2008).

¶6 Appellant contends on appeal the record does not contain substantial evidence supporting the court's ruling. Specifically, she argues there was insufficient evidence she is gravely disabled and the court erred when it denied her motion for a directed verdict. Section 36-501(16) provides that "'[g]ravely disabled' means a condition evidenced by behavior in which a person, as a result of a mental disorder, is likely to come to serious physical harm or serious illness because the person is unable to provide for the person's own basic physical needs."

¶7 Appellant points to evidence presented at the hearing that was in her favor and demonstrated her ability to care for herself. For example, she notes Placencio's testimony that even though the boarding house prepares appellant's meals, she "has no problem eating her meals on her own." Appellant argues that the mere fact that meals are being prepared for her does not mean she is incapable of preparing her own meals. She also relies on Placencio's testimony that appellant takes her medications, follows through with services, understands and participates with recommended treatments, visits a friend by taking the bus to where the friend lives, and has not been hospitalized since October of 2009. She also argues there was a complete absence of evidence about her ability to provide her own clothing.

¶8 We note, first, that in general, when an appellant raises a debatable issue on appeal, the failure of the appellee to file an answering brief "constitutes a confession of

reversible error." *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980). But reversal is not mandatory, and we have the discretion to address the merits of the arguments raised instead. *Id*.; *see also Hoffman v. Hoffman*, 4 Ariz. App. 83, 85, 417 P.2d 717, 719 (1966) (because treating mother's failure to file answering brief in child custody appeal as confession of error would not "serve the ends of justice" and could adversely affect children, appellate court addressed merits instead); *In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002) (appellate court may, in its discretion, treat appellee's failure to file answering brief as confession of error). In our discretion we address the merits of appellant's arguments.

¶9 Appellant is essentially asking us to reweigh the evidence, which is within the province of the trial court to do because, as the trier of fact, it is in the best position to assess the credibility of the witnesses and determine the weight that is to be given to the testimony presented. *See Jesus M. v. Ariz. Dep't of Econ. Sec*., 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (recognizing trial court in best position to observe witnesses, judge credibility, weigh evidence, and make findings of fact, and acknowledging appellate court must defer to trial court "unless no reasonable evidence supports those findings"). Deferring to the trial court in this regard, there was sufficient evidence to support its denial of the motion for directed verdict and its granting of the petition.

¶10 The evidence included the testimony of Dr. Fitzpatrick, a psychiatrist who had been treating appellant from June through August 2010. She explained she treated appellant as a "tele-psychiatrist," that is, with the aid of teleconferencing technology. She had reviewed appellant's entire file, had seen her three times, and had consulted with Placencio, appellant's case manager. Dr. Fitzpatrick stated appellant had been diagnosed as suffering from paranoid schizophrenia and specified the various medications she had

been prescribed. She stated she was aware appellant received "medication management appointments with the psychiatrist, medication box monitoring, and case management services at the clinic."

¶11 Dr. Fitzpatrick also testified that appellant received assistance with her medication management at the boarding house where she was living. She stated that, based on information in appellant's file, appellant needed assistance with her daily activities, noting the file reflected that in September 2009, "she had had significant lack of caregiver ADLs. She was filthy. Her apartment was filthy. There was feces found, dirty clothes. She was soiled and at times she would come to the clinic smelling of urine and was soiled. Dirty hair. Dirty appearance. Dirty clothing." When asked what assistance she believed appellant received at the boarding house, Dr. Fitzpatrick stated, "they cue her to complete her ADLs and . . . prompt her to take her medications."

¶12 She did not believe appellant could complete these tasks without supervision, and felt she could suffer serious physical harm or illness without assistance with the tasks of daily living. When asked for the basis of that opinion, Dr. Fitzpatrick explained it was, in part, because of the nature of her mental illness and the fact that she was occasionally delusional. In addition, she relied on the deplorable state to which appellant had disintegrated a year earlier when she had not had help. Although she did not believe it was necessary to appoint a guardian for appellant, she emphasized that based on the nature of appellant's illness, particularly because she was "highly delusional," she would be at great risk if not supervised, adding there were no other alternatives. She stated appellant was being given the opportunity to "participate in the community and reduce her suffering." But because appellant is delusional, Dr.

Fitzpatrick explained, and has "very limited insight into her condition and has a history of noncompliance with her medications," voluntary treatment is not an option.

¶13 Although counsel's cross-examination of Dr. Fitzpatrick demonstrated that Fitzpatrick lacked specific knowledge about the boarding house, the court also heard the testimony by Placencio who possessed such knowledge. Placencio testified that personnel at the boarding home "cue[]" its residents to take their medications and help them fill in their medicine boxes. Meals also are provided. She opined that the boarding house was a good place for appellant and that if appellant's treatment were not "rolled over," she did not believe appellant would remain there. And, she did not believe appellant could live on her own because she would deteriorate, as she had before court-ordered treatment was implemented.

¶14 To the extent there were conflicts in the evidence, it was for the trial court to resolve them. *See In re MH 2007-001236*, 220 Ariz. 160, n.17, 204 P.3d at 429 n.17 (even if physicians disagree trial court may find by clear and convincing evidence patient needs court-ordered treatment). And, as we stated above, it was for the trial court to determine how much weight to give the testimony of the witnesses. Ultimately, the court credited Dr. Fitzpatrick's testimony and gave it the most weight. We have no basis for interfering with the court's exercise of such discretion. Given the evidence that was before the court, we cannot say it erred in denying the motion for directed verdict and granting the petition to continue appellant's treatment.

¶15 Appellant also contends the trial court failed to "address [the] elements of § 36-543(H)" and placed the burden on her instead of the petitioner. She asserts that the statute provides that a petitioner seeking a renewal of the court's treatment order pursuant to subsection (G) must establish by clear and convincing evidence the person is, inter

alia, gravely disabled, "in need of treatment," and "either unwilling or unable to accept treatment voluntarily." § 36-543(H). Appellant concedes she needs treatment for a mental disorder, but reiterates her claim that the evidence did not sufficiently establish she is gravely disabled, an argument we have already rejected. We reject the remaining arguments as well.

¶16 Dr. Fitzpatrick specifically addressed the other factors in her testimony. She explained the nature of appellant's illness, her history of non-compliance, and the rapidity with which she would disintegrate if she were to stop taking her medications—all of which relate to appellant's need for involuntary treatment. She essentially explained that appellant was either unwilling or unable to accept treatment voluntarily. The court noted the relevant evidence, and both the transcript and minute entry reflect that the court considered the proper factors.

¶17 Nor did the trial court ascribe to appellant the burden of establishing she would voluntarily seek treatment and the court-ordered treatment was no longer necessary. The court's comments about the absence of evidence that would support such a conclusion does not reflect the court had shifted the burden to appellant. Rather, the court was merely noting that the evidence that was introduced established that appellant was functioning well because of the supervision and assistance she received and that she had not done well before the court had ordered treatment. From this and other evidence, the court could and did infer that voluntary treatment was not a viable alternative for appellant. In other words, the court's comments reflect that it did not believe the evidence supported a finding that voluntary treatment was appropriate under the circumstances.

¶18 Appellant also seems to be suggesting the proper procedures were not followed in accordance with § 36-543(E) and the "Petition for renewal of the court order should not have even taken place" because the medical director of the mental health treatment agency had not determined that she had been substantially noncompliant during the period of court-ordered treatment. Appellant did not raise this argument below and we generally will not consider an argument such as this that is raised for the first time on appeal. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982). The argument has been waived.

¶19 For the reasons stated, we affirm the trial court's order for continued treatment of a gravely disabled individual.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge