IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SHEENA W., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, B.W., *Appellees*.

No. 1 CA-JV 21-0347
FILED 12-8-2022

Appeal from the Superior Court in Maricopa County
No. JD27321, JS20790
The Honorable David O. Cunanan, Judge, *Retired*

AFFIRMED

COUNSEL

John L. Popilek P.C., Scottsdale
By John L. Popilek
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Bailey Leo
Counsel for Appellee Department of Child Safety

OPINION

Judge Brian Y. Furuya delivered the opinion of the Court, in which Presiding Judge David D. Weinzweig and Judge Jennifer M. Perkins joined.

F U R U Y A, Judge:

¶1 Sheena W. ("Mother") appeals the juvenile court's order terminating her parental rights to B.W., her Child. Mother contends, among other arguments, that she was not provided adequate services to facilitate her reunification with Child. We hold that when a parent is convicted of felony child abuse of her child, and the Department of Child Safety ("DCS") later seeks termination of the abuser's parental rights to the abused child, DCS is not required to offer that parent reunification services after such a conviction. For this and other reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Over the past eight years, the Child has been in care as a part of three dependencies given Mother's abuse and neglect. In 2013, police and DCS observed Mother "screaming she was going to kill herself while walking down the canal with" then-four-year-old Child. Mother "threw herself on the ground and rolled around uncontrollabl[y]," stating, "[I] can't take this kid anymore." DCS removed Child.

¶3 During that first dependency, Mother received a psychological evaluation, substance-abuse testing and treatment, counseling, parent-aide services, and parenting classes. Mother completed services, and the court returned Child to her care in early 2016. Mother was informed that she needed to obtain insurance for Child and enroll him in behavioral-health services to address his aggressive behaviors, but she did not do so.

¶4 Two months later, DCS removed Child from Mother's care after she hit him with a belt, causing numerous welts to his body. Mother was also not providing for Child's basic needs or addressing her own mental-health issues. DCS offered her services during the second dependency, including two psychological evaluations, substance-abuse testing, individual and family counseling, anger-management and domestic-violence services, parent aides, and visitation. DCS also provided Child with behavioral coaching and counseling.

¶5 Three years into the dependency, the court changed the case plan to severance and adoption and DCS moved to terminate Mother's parental rights. After an adjudication hearing, the court denied the motion, citing lack of an adoptive placement for Child and the strong bond he had with Mother. Nonetheless, the court found Child remained dependent. Mother continued with services, and the court returned Child to her. She continued Child's behavioral-health services after that second dependency was dismissed.

¶6 About five months later, however, Mother physically abused Child by beating him with a metal broom pole. Doctors at Phoenix Children's Hospital treated his extensive injuries. DCS petitioned for a third dependency and placed Child with a foster parent who had significant experience caring for him. It referred Child for high-needs case management, individual counseling, and behavioral coaching, and immediately petitioned to terminate Mother's parental rights under the abuse and prior-removal grounds. *See* Arizona Revised Statutes ("A.R.S.") § 8-533(B)(2), (B)(11). One month after DCS filed its dependency and termination petitions, Mother was convicted of felony child abuse involving Child and was later sentenced to five years' probation.

¶7 Over the next seven months, DCS attempted to evaluate Mother for services, but she refused to communicate with the case manager. On the few occasions Mother did speak with DCS, she acted erratic and combative, preventing any assessment. Therefore, DCS referred her only for visitation. Mother received other services through probation or self-referral, including individual and domestic-violence counseling, parenting-aide services, and parenting classes.

¶8 Shortly before the three-day termination adjudication, Child was diagnosed with oppositional defiance disorder ("ODD"), and DCS referred him for individual therapy. While the hearing was ongoing, DCS moved Child to a group home because his foster parent was no longer able to care for him. Over the following month, Child attempted to run away from the group home three times. After the hearing concluded, the court adjudicated Child dependent and terminated Mother's parental rights.

¶9 Mother timely appealed, and we have jurisdiction pursuant to A.R.S. § 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 601(A).

DISCUSSION

¶10 According to Mother, the juvenile court erred in finding DCS made diligent efforts to provide her with appropriate reunification services and that termination was in Child's best interests.

¶11 It is beyond dispute that "parents have a fundamental liberty interest in the care, custody, and management of their child, that does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Timothy B. v. Dep't of Child Safety*, 252 Ariz. 470, 476 ¶ 24 (2022) (cleaned up), quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). However, a parent's right to custody and control of her own child, while fundamental, is not absolute. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). Termination of parental rights may be warranted when the state proves at least one statutory ground under A.R.S. § 8-533 by "clear and convincing evidence." *Id.*; *see also* Ariz. R.P. Juv. Ct. 353(C)(1). "Clear and convincing" means the grounds for termination are "highly probable or reasonably certain." *Kent K.*, 210 Ariz. at 284–85 ¶ 25, quoting Black's Law Dictionary 577 (7th ed. 1999). As relevant here, a parent's rights may be severed if that parent "willfully abused a child." A.R.S. § 8-533(B)(2). The court must also separately find by a preponderance of the evidence that severance is in the child's best interests. A.R.S. § 8-533(B); Ariz. R.P. Juv. Ct. 353(C)(2).

¶12 "We will affirm a termination order unless the juvenile court abuses its discretion or the court's findings are not supported by reasonable evidence." *Timothy B.*, 252 Ariz. at 474 ¶ 14. During our review, we do not reweigh the evidence, but "look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47 ¶ 8 (App. 2004).

I. Diligent Efforts.

¶13 If a child has been removed from the home during a dependency action, the court usually must order DCS "to make reasonable efforts to provide [reunification] services to the child and the child's parent." A.R.S. § 8-846(A). Our supreme court emphasized that the government must "engage in reunification efforts on constitutional grounds as a necessary element of any state attempt to overcome the fundamental liberty interest of the natural parents in the care, custody and management of their child." *Jessie D. v. Dep't of Child Safety*, 251 Ariz. 574, 581 ¶ 18 (2021) (cleaned up), *cert. denied sub nom Jessie D. v. Arizona Dep't of Child Safety*, 142 S. Ct. 2663 (2022). In the usual circumstance, such services

are essential "in severance proceedings because the combined effect of the fundamental character of a parent's right to his child and the severity and permanence of termination dictates that the court sever the parent-child relationship only in the most extraordinary circumstances, *when all other efforts to preserve the relationship have failed*." *Id.* (emphasis in original). And where reunification services are required, DCS must allow the parent the "time and opportunity to participate in programs designed to improve [her] ability to care for the child." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 94 ¶ 20 (App. 2009).

¶14 Although the requirement to provide reunification services is rightly broad, it is not universal. For instance, we have held before that DCS' mandate is to "undertake measures [that have] a reasonable prospect of success" in reuniting the family, not ones that are futile. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192 ¶ 34 (App. 1999). And the general rule requiring DCS to provide reunification services is subject to statutory exceptions, including those listed in subsections (D), (E), and (F) of § 8-846. As relevant here, "[r]eunification services are not required to be provided if the court finds by clear and convincing evidence" that "[t]he parent . . . committed an act that constitutes a dangerous crime against children as defined in § 13-705 or caused a child to suffer serious physical injury." A.R.S. § 8-846(D)(1)(d). Child abuse committed against a minor who is under fifteen years of age is a "[d]angerous crime against children." A.R.S. § 13-705(R)(1)(h). Such child abuse is that which "[u]nder circumstances likely to produce . . . serious physical injury, any person who causes a child [under fifteen years of age] . . . to suffer physical injury," intentionally or knowingly. A.R.S. § 13-3623(A)(1).

¶15 Here, the parties dispute whether DCS was required to provide Mother services under the facts of this case. Today, we clarify that when a parent has been convicted of felony child abuse, as Mother was here, DCS is not required to offer that parent reunification services during that child's dependency.

¶16 During Child's dependency, Mother was convicted of child abuse for beating Child, who was under fifteen years of age, with a metal broom pole requiring hospital treatment for his extensive injuries. This qualifies as a dangerous crime against a child, *see* A.R.S. §§ 13-705(R)(1)(h) and -3623(A)(1), and also constitutes an act "that caused a child to suffer serious physical injury," *see* A.R.S. § 8-846(D)(1)(d). Mother's criminal conviction established she committed that act beyond a reasonable doubt, which satisfies the exception under A.R.S. § 8-846. Once DCS had evidence of Mother's conviction of child abuse, it had no further obligation to

provide her with reunification services in this dependency. *See* A.R.S. § 8-846(A), (D)(1)(d).

¶17 Given our holding that reunification services were not required, we do not address Mother's arguments that DCS provided inadequate services.

II. Best Interests.

¶18 Mother contends that DCS needed to provide expert testimony about Child's ODD diagnosis before the juvenile court could determine his best interests. She identifies no controlling or persuasive authority to support her proposition and we are not persuaded.

¶19 In addition to finding a statutory ground for termination, the juvenile court must, as previously discussed, determine if termination of a parent's rights would serve the best interests of the child by a preponderance of the evidence. *Kent K.*, 210 Ariz. at 284 ¶ 22; *see also* A.R.S. § 8-533(B); Ariz. R.P. Juv. Ct. 353(C)(2). Once the court finds a parent unfit under at least one statutory ground for termination, "the interests of the parent and child diverge," and the court proceeds to balance the unfit parent's "interest in the care and custody of his or her child . . . against the independent and often adverse interests of the child in a safe and stable home life." *Kent K.*, 210 Ariz. at 286 ¶ 35. "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) (emphasis omitted). Courts "must consider the totality of the circumstances existing at the time of the severance determination, including the child's adoptability and the parent's rehabilitation." *Alma S. v. DCS*, 245 Ariz. 146, 148 ¶ 1 (2018).

¶20 The court may find a child would benefit from termination if there is an adoption plan or if the child is adoptable, *id.*, at 150–51 ¶¶ 13–14, or if the child "would benefit psychologically from the stability an adoption would provide," *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 352 (App. 1994). The court may also find a child would be harmed by the continuation of the parent-child relationship "where there is clear and convincing evidence of parental unfitness which has not been remedied notwithstanding the provision of services by [DCS] and which detrimentally affects the child's well-being." *Pima Cty. Juv. Action No. S-2460*, 162 Ariz. 156, 158 (App. 1989).

¶21 Mother argues DCS failed to prove Child would receive either a benefit from termination or a detriment from continuing the parent-child relationship. She points out that Child was not residing in an adoptive placement at the time of the termination trial, he opposed termination, and he had run away from his group home multiple times. Mother contends he was therefore in "greater emotional and physical danger" than if placed with her. To the extent Mother's arguments are a request to reweigh the evidence, we may not do so. *Mary Lou C.*, 207 Ariz. at 47 ¶ 8.

¶22 Contrary to Mother's assertion, the court found numerous benefits for termination. Although Child was not in an adoptive placement, the court found termination would "further the plan of adoption, which would provide [him] with permanency and stability." The court elaborated that DCS was making "various recruitment efforts" to help find Child a permanent placement, and Child "is involved in individual counseling which can assist [him] in . . . accept[ing] a permanent placement." The court also found Child might be open to a plan of adoption in the future because he had "previously articulated a desire to be adopted" by his former foster placement. This former foster placement hoped to maintain a relationship with him and told DCS she would consider adopting him in the future. The court found Child is adoptable, despite his challenging behaviors. These findings are supported by reasonable evidence in the record.

¶23 The juvenile court also found that continuing the parent-child relationship would be a detriment to Child because "it would delay permanency, leaving the child to linger in care for an indeterminate period since the child does not have parents who are able to care for him," noting "this is the third dependency action for this child and the second dependency regarding physical abuse by Mother," and that Mother "is unable or unwilling to stop the physical abuse, despite numerous services being available to her." Reasonable evidence supports these findings.

¶24 Mother cites her significant bond to Child. There is no question Mother loves Child, and they share a strong bond. But the juvenile court considered this evidence and found the previously enumerated factors outweigh that bond. *See Dominique M. v. DCS*, 240 Ariz. 96, 98–99 ¶ 12 (App. 2016) (explaining the bond between parent and child is a non-dispositive factor to consider in determining a child's best interests). Therefore, the court did not abuse its discretion in concluding that termination was in Child's best interests.

CONCLUSION

¶25 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA