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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/29/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAUREN V.,) No. 1 CA-JV 12-0019
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, LILITH V., JAMES V.,) Rule 28 ARCAP)
DARRIN H.,)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Yavapai County

Cause No. V1300JD201180011

The Honorable Margaret A. McCullough, Judge

AFFIRMED

M. Alex Harris) Prescott
Attorney for Appellant)

Thomas C. Horne, Arizona Attorney General) Phoenix
By Eric Devany, Assistant Attorney General) Mesa
Attorneys for Appellee ADES)

Judith Elaine Abramsohn) Phoenix
Attorney for Appellee Father)

S W A N N, Judge

¶1 Mother, Lauren V., appeals the juvenile court's
determination that her children, L.V. and J.V. (the "Children"),

are dependent as to her.¹ On appeal, Mother contends that the lower court erred in finding the Children dependent because: it failed to adhere to various procedural rules and enforce its own orders; the state did not make reasonable efforts to offer reunification services; the court failed to enforce the state's disclosure obligations; and the court failed to reach an appropriate conclusion based on the facts. We conclude that the juvenile court conducted the proceedings appropriately, and that its findings were based on sufficient evidence. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Darrin H. ("Father") are the unmarried biological parents of the Children. Mother and Father have never been married or lived together. On February 12, 2011, Father was scheduled to take the Children for the day. On the day before, Father notified Mother that he would be unable to take the Children for his scheduled visit because a septic tank burst at his home, which caused sewage to overflow into the home. Despite Father's explanation, Mother drove the Children to his home and demanded that he take the Children. When Father refused to take the Children, Mother contacted the Camp Verde Marshal's Office to enforce the scheduled visit. When the

¹ The court also found the Children dependent as to their father. Their father is not a party to this appeal.

police refused to intervene, Mother threatened to leave the Children (who were one and two years old) alone on the side of the road. Mother also told the police that if Father did not take the Children, then Child Protective Services ("CPS") should come and take them. Mother ultimately left with the Children without further incident.

¶13 In April 2011, Mother told Father that she decided that she was going to take the Children on an extended road trip in a travel trailer and would conclude the trip by moving to New Mexico. In mid-April, Mother took the Children to Father's home and told him that the Children would be better off living with him because she was ill and her travel trailer did not have air conditioning. Father later testified that the Children arrived at his home on a very cold day not wearing shoes, socks, or jackets. Mother then took the Children for a day and returned them to Father dirty and without proper clothing. In addition, their son had a severe diaper rash.

¶14 On April 18, 2011, Father reported to CPS that he believed that Mother was not properly caring for the Children, and that he was concerned that Mother might suffer from Munchausen syndrome by proxy. Father alleged that Mother was not allowing their daughter to eat properly, and that Mother was unnecessarily taking the Children to the doctor. Father

expressed concerns about Mother's general mental health and the Children's personal hygiene.

¶15 In response to this report, CPS issued a safety plan providing that the Children were to stay in the physical care of Father until Mother's mental health issues and the Children's medical issues could be addressed. CPS began reviewing the Children's medical records and met several times with Mother and Father. However, Mother became unhappy with the safety plan, and she demanded that CPS either return the Children to her or provide her with paperwork stating that CPS was taking the Children into custody.

¶16 On May 4, 2011, the Arizona Department of Economic Security ("ADES") filed an In-home Dependency Petition and Petition for Paternity and/or Child Support. The petition alleged that Mother was neglecting the Children for reasons relating to her mental health; Mother presented with irrational and erratic behavior; Mother could not provide a stable home; and Mother had no long-term, stable income. On May 10, 2011, the Yavapai County Superior Court held a preliminary protective hearing. Because Mother had been an attorney in Yavapai County and Father worked for the police department in Yavapai County, the court ordered that the case be reassigned to Coconino County.

¶17 On May 16, 2011, Mother underwent a psychological evaluation by Dr. James Thal. In the psychological evaluation, Mother described herself as an "aggressive bitch" and referred to Father as a "child abusing asshole." Dr. Thal determined that Mother's decision-making had periodically "been deeply flawed," "erratic," and "self-defeating," and her life was in transition. She could not support herself, and her adoptive father was supporting her indefinitely. Mother also failed to tell Dr. Thal that her law license had been suspended.² Dr. Thal noted that Mother has been receiving treatment for attention deficit/hyperactivity disorder since she was seventeen years old, and she has been receiving treatment for depression since 2003.

¶18 On May 18 and 19, 2011, a preliminary protective hearing took place. During the hearing, the judge confirmed that counsel had been appointed for both parties. The court found that the "continuation of the [C]hildren in the father's home [was] in their best interests[,] and ruled that the Children would remain wards of the court in the legal care and custody of ADES. Father admitted the allegations in the petition and the Children were found dependent as to him, while

² In April 2011, Mother was suspended from the practice of law in Arizona after she self-reported for mismanagement of over \$25,000 of client assets.

Mother denied the allegations as to her and requested a mediation.

¶9 On May 27, 2011, Father moved to consolidate the dependency action and the family court cases, and the court granted the motion. On July 6, 2011, Mother's counsel in the dependency action, Jonna Hoffman, filed a motion to withdraw after Mother demanded that she be discharged. On July 11, 2011, the court granted the motion to withdraw, and ordered Mother to provide a financial statement as soon as possible. In the meantime, the court appointed Debra Phelan to represent Mother. On August 4, 2011, Ms. Phelan submitted a motion to withdraw as a result of both a disagreement with Mother that damaged their relationship and Mother's demand that she withdraw. The court granted Ms. Phelan's motion. On August 9, 2011, after reviewing Mother's financial statements, the court determined that Mother was ineligible for further court-appointed counsel.

¶10 On August 30, 2011, Mother filed a motion to compel disclosure. On September 16, 2011, ADES responded, stating that ADES "ha[d] provided Mother with all non-privileged information as required by [Ariz. R.P. Juv. Ct.] 44." Also, ADES informed Mother of her right to inspect its case files. The court granted Mother's motion to compel disclosure, but noted that "the State's Response indicates that all non-privileged information has been disclosed and Mother is free to exercise

her right to inspect the Department case files." Mother then filed another motion to compel disclosure, together with a motion to preclude and motion for sanctions, contending that ADES withheld its records. ADES objected to the motion as vague and legally insufficient, and noted that Mother did inspect the records on October 13, 2011. The court granted ADES's request to strike Mother's motions.

¶11 The dependency and custody actions were decided after a five-day trial held in August and October and concluding on November 9, 2011. (The protracted trial was the result of various issues discussed below.) After taking the matter under advisement, on January 4, 2012, the court found that ADES proved by a preponderance of the evidence that the Children were dependent as to Mother, noting "[t]he testimony and evidence support[ed] Dr. Thal's conclusion that mother's mental health issues have resulted in flawed decision making." The court's findings included several examples of Mother's failed decision-making.³ Accordingly, the court granted the In-Home Dependency

³ Examples of the court's findings concerning Mother's decision-making included: Mother threatening to ruin Father's life if he did not comply with her demands; Mother trying to force the February 2011 visit and calling law enforcement to enforce the visit; Mother sending Father 1,200 text messages from August 18, 2009 to May 2011; Mother stating that her son has an allergy to dogs and cats, while Mother owned dogs and cats; Mother referring to Father as an "asshole" and a "deadbeat" in front of the nanny and the Children; Mother's unstable living conditions; Mother's problems with the State Bar of Arizona; and Mother

Petition filed May 4, 2011, and affirmed the placement of the Children in the physical custody of Father.

¶12 Mother timely appeals the decision. We have jurisdiction pursuant to Ariz. R.P. Juv. Ct. 103(A).

STANDARD OF REVIEW

¶13 Because the juvenile court is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings, we accept its findings of fact unless no reasonable evidence supports them. *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 234, ¶ 13, 256 P.3d 628, 631 (App. 2011). Therefore, the juvenile court's decisions in dependency proceedings concerning the weight and effect of evidence will not be disturbed unless clearly erroneous. *Maricopa Cnty. Juv. Action No. JD-6123*, 191 Ariz. 384, 388, 956 P.2d 511, 515 (App. 1997).

DISCUSSION

I. THE JUVENILE COURT'S PROCEDURAL CONDUCT DID NOT AMOUNT TO AN ABUSE OF DISCRETION.

¶14 Mother contends that the juvenile court erred by failing to rule on her motion to dismiss in a timely manner, because her motion was filed July 21, 2011, and it was not denied until February 27, 2012. She contends that this delay warrants reversal. We disagree. Mother's two-page motion to

expressing that she would rather the Children live in foster care than with Father.

dismiss articulated no grounds for dismissal apart from reciting a conditional agreement by ADES to dismiss the dependency if physical custody of the Children was transferred to Father. Father opposed the motion, as did counsel for the Children. Mother, rather than requesting a ruling on the motion to dismiss, proceeded toward trial -- even moving to continue the trial without mentioning the motion to dismiss. Mother filed several other motions to dismiss that were all denied. Though we cannot determine the reason for the timing of the denial of the motion to dismiss, we discern no prejudice to Mother and no basis for reversal.

¶15 Mother next contends that the court erred by failing to timely conclude the trial. By statute, a dependency adjudication hearing shall be completed within ninety days (or, for good cause, 120 days) "after service of the dependency petition" on the parent. A.R.S. § 8-842(B). In this case, Mother accepted service on May 18, 2011. Without objection, the trial was originally scheduled for August 30 and 31, 2011 (after Mother moved to continue it from an earlier setting). Ultimately, the trial lasted three extra days to accommodate witness testimony and various issues in the family court matter and concluded on November 9, 2011. Therefore, the dependency adjudication hearing was completed more than 120 days after Mother accepted service.

¶16 In an order denying Mother's motion on this issue filed on the last day of trial, the court acknowledged that the hearing was concluded late. In its ruling, the court stated that it did "not believe that dismissal of the entire matter [was] in the best interests of the minor children and therefore, [it was] not the appropriate remedy." In view of the fact that the court extended the trial time to accommodate the need for additional evidence, that Mother herself sought to delay the trial, that Mother did not timely raise the issue with the trial court, and that Mother did not seek any interlocutory relief, we find no reversible error. See *Joshua J. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 417, 423-24, ¶¶ 19, 24, 286 P.3d 166, 172-73 (App. 2012) ("[W]e conclude that the Legislature did not intend to require automatic dismissal of dependency proceedings when the statutory time limit is exceeded" unless the parent demonstrates "prejudice from the juvenile court's failure to comply with the deadlines in A.R.S. § 8-842(C) and Rule 55(B)."). Because we find no prejudice, we conclude that reversal on this ground would be inappropriate.

II. THE JUVENILE COURT DID NOT ERR BY FINDING THAT MOTHER WAS NOT ENTITLED TO APPOINTED COUNSEL.

¶17 The court has the authority to determine whether a person is eligible to receive appointed counsel. Ariz. R.P. Juv. Ct. 38(B) provides:

The court shall order the appointment of counsel for those persons entitled to counsel and determined to be indigent, as provided by law. In determining whether a person is indigent, the court shall order the person to provide proof of financial resources by filing a financial questionnaire provided by the court. The court may question the person under oath. If the court determines the person is not indigent the court may order the person to pay a reasonable portion of the cost of counsel or deny the request for appointment of counsel.

¶18 Mother contends that "financial status is not the only basis upon which a court should consider the appointment of counsel" and that the court erred by not considering the "importance of the interest at stake[.]" She contends that the court should have applied "the balancing test" in determining whether she should have been appointed counsel.

¶19 We disagree. Rule 38 does not prescribe a balancing test. Here, Mother was appointed two different attorneys: Ms. Hoffman and Ms. Phelan. Under Rule 38, if a person's financial records and other evidence failed to demonstrate indigency, the person is not entitled to appointed counsel. Mother testified that she was currently receiving approximately \$3,500 per month from her father. The court "reviewed financial statement[s] for both mother and father" and found that "neither qualifie[d] for court appointed counsel." The court had discretion to determine whether, in the circumstances, this income precluded Mother from

being classified as indigent. See Ariz. R.P. Juv. Ct. 38(B). We find no abuse of discretion.

III. THE JUVENILE COURT DID NOT ERR BY FINDING THAT ADES PROVIDED ADEQUATE REUNIFICATION SERVICES.

¶20 Mother contends that the state failed to make reasonable efforts to avoid the removal of the Children from the home. Contrary to Mother's argument, the state is not required to provide "reasonable efforts to prevent dependency" in order for a child to be found dependent. See A.R.S. § 8-201(13); Ariz. R.P. Juv. Ct. 55. That said, it is true that, once a child has been removed from the home, the state is required to make reasonable efforts to provide services to the child and the parent. A.R.S. § 8-846(A). From the record, the state amply discharged this obligation. Mother testified that CPS offered her various pre-dependency-finding services, including parent aide services, transportation assistance, and a psychological evaluation by Dr. Thal on May 16, 2011; and CPS consulted her regarding what medical appointments she wanted CPS to make for the Children during the dependency proceeding. The state was not required to provide pre-dependency services, let alone every service that Mother desired, and the services it did provide are more thorough than Mother suggests in her brief. We conclude that the juvenile court did not err in finding that the services provided by CPS were adequate.

IV. *THE JUVENILE COURT DID NOT ERR BY DENYING MOTHER'S MOTION TO COMPEL DISCLOSURE, TO PRECLUDE AND FOR SANCTIONS.*

¶21 Under Ariz. R.P. Juv. Ct. 44(B)(2), parties must disclose to each other the uncontested facts deemed material, contested issues of fact and law which may be material or applicable, a statement of other issues of fact or law which the party believes to be material, a list of witnesses the party intends to call at trial, and a list of and copies of all exhibits which the party intends to use at trial. "Upon motion of a party or the court's own motion, the court may impose sanctions upon a party who fails to disclose information in its possession which is subject to disclosure or fails to disclose such information in a timely manner[.]" Ariz. R.P. Juv. Ct. 44(G).

¶22 Mother contends that the juvenile court erred by preventing "parties from submitting materials obtained or created after the original Pretrial Statement date some [four] months before the trial closed, and after the date it arbitrarily chose." Mother also contends the court impermissibly "allowed the State to proceed while it refused to reveal exculpatory evidence in its possession."

¶23 Again, we disagree. With regard to the first argument, Mother complains that the juvenile court did not allow her to call her counselor (whom she had been seeing for a month)

as a witness. But Mother only disclosed the counselor as a witness the weekend before trial, and she concedes on appeal that her disclosure was late. We find no abuse of discretion in the juvenile court's decision to preclude the counselor from testifying, especially given its decision to permit Mother to testify as to the counselor's findings and recommendations.

¶24 With regard to the second argument, as noted above, Mother filed two motions to compel disclosure. Although the court granted Mother's first motion, it noted that ADES "ha[d] provided Mother with all non-privileged information as required by [Ariz. R.P. Juv. Ct.] 44." The court denied Mother's second motion. We find no error.

¶25 The state confirmed both before and at trial that it had provided Mother all of the case notes and all of the documents in its possession. Mother never specified any documents that she believed the state failed to disclose. The state notified Mother that she could set up a meeting with ADES to look through its files on one week's notice. Mother contacted ADES on October 6, 2011, and notified the ADES case worker that she wanted to review the file the next day. Although ADES could not arrange for Mother immediately to review the file, she was able to review it on October 13, 2011. Mother's unsupported belief that documents were missing does not support a conclusion that those documents existed or that ADES

withheld them. Based on the evidence before it, the juvenile court properly found that ADES did not violate its duty to disclose, and that sanctions for preclusion and contempt were not warranted.

V. THE JUVENILE COURT'S DEPENDENCY FINDING WAS SUPPORTED BY REASONABLE EVIDENCE.

¶126 ADES bore the burden to prove the Children's dependent status by a preponderance of the evidence. A.R.S. § 8-201(13)(a)(i) defines a dependent child as one who is: "In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control."

¶127 Mother contends that the state failed to meet its burden. Mother argues that she was never accused of harming the Children, and she demonstrated that she was diligent in monitoring the needs of the Children. In addition, Mother contends that there was no evidence presented to support the allegation that she threatened to "leave the children on the side of the road[.]"

¶128 The juvenile court's dependency finding was properly supported by the evidence received at trial. There was ample evidence to find that Mother demonstrated that she was not capable of exercising proper parental care and control. The state presented testimony from multiple witnesses regarding

Mother's inability to provide for the Children. Father testified that Mother was not adhering to doctors' advice regarding food trials for their daughter, and that on multiple occasions the Children were dirty and wore improper clothing. On August 31, 2011, Mother's brother testified that over the past six months he believed Mother was unstable. Also, the Children's nanny testified that she was worried about Mother because she would refer to Father as an "asshole" and a "deadbeat" in the Children's presence. And despite Mother's contention that there was no evidence that she threatened to leave her children on the side of the road, Mother herself testified that she made that precise threat to police.

¶129 Mother "essentially asks us to reweigh the evidence presented to the court and to replace its judgment with our own, something we will not do." *Xavier R. v. Joseph R.*, 230 Ariz. 96, 100, ¶ 12, 280 P.3d 640, 644 (App. 2012). Because the juvenile court's findings of fact were properly supported, there is no legal basis upon which we can reject its ruling.

CONCLUSION

¶30 For the foregoing reasons, we affirm the juvenile court's determination that the Children were dependent as to Mother.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

SAMUEL A. THUMMA, Judge