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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/5/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEPHANIE H. ,) No. 1 CA-JV 12-0088
)
Appellant,) DEPARTMENT C
)
v.) MEMORANDUM DECISION
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, S.H. ,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015GC201100059

The Honorable Richard Weiss, Judge

AFFIRMED

Thomas C. Horne, Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

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By Heather C. Wellborn
Attorneys for Appellant

J O H N S E N, Judge

¶1 Stephanie H. ("Mother") appeals the superior court's order appointing a permanent guardian for her son, S.H. ("Child"). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Child Protective Services ("CPS") received a report on February 1, 2010, that Mother believed people were terrorizing her and she had no money or food for Child, who was then 17 months old. A few days later, Mother went to the emergency room and reported people were poisoning her. She demanded a drug test and tested positive for methamphetamine ("meth"). When CPS arrived at her home on February 5, Mother was being arrested on a perjury charge resulting from false testimony she gave in a custody proceeding about the whereabouts of her two other children. CPS placed Child in foster care after Mother refused to provide contact information for someone who could take care of him.

¶3 In late March 2010, shortly after Mother's release from jail, the superior court adjudicated Child dependent as to Mother and approved a case plan of family reunification proposed by the Department of Economic Security ("ADES"). ADES offered Mother numerous services, but she refused to participate in the mental health and substance abuse referrals.

¶4 In April 2010, Mother again tested positive for meth and claimed her case manager tampered with the urine sample.

Mother then was arrested on an unrelated charge and remained in custody until October 2010. Meanwhile, Child was placed with his maternal grandmother ("Grandmother").

¶15 After Mother was released, she had a period of sobriety. The CPS case manager asked her to undergo a psychological evaluation in January 2011. During the evaluation, Mother denied any use of meth or history of mental illness, and the psychologist noted that, given Mother's responses and records of sobriety, there was a "low probability that she [has] . . . a substance dependence disorder. As such, [Mother's] potential for alcohol or other substance abuse and/or other addictive behavior appear[s] to be low." Due in significant part to the psychological evaluation, Mother regained physical custody of Child in March 2011.

¶16 Less than three months later, while on probation for her perjury conviction, Mother twice tested positive for meth. According to the probation disposition report, she "adamantly denied" using the drug and maintained that she was "set up," pointing to books such as Charles Darwin's *Origin of Species* as "proof." Child again was placed in Grandmother's custody, and ADES filed a motion for permanent guardianship in August 2011. Mother was incarcerated until late September 2011, when she completed a required psychiatric evaluation. In her meeting with the psychiatrist, she denied having a drug problem and

explained that her recent positive tests for meth were “delusional.”

¶17 The superior court held a contested guardianship hearing over four days between December 2011 and March 2012, while Child remained in Grandmother’s custody. Mother testified that she was fully capable of taking care of Child and neither needed nor wanted substance abuse treatment. The case manager testified that Child had been in the State’s custody for almost two years and Mother’s behavior during that time demonstrated that her substance abuse will continue.

¶18 The superior court granted ADES’s motion to appoint Grandmother as Child’s permanent guardian. Mother’s timely appeal followed. We have jurisdiction pursuant to A.R.S. sections 8-235(A) (West 2013), 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).¹

DISCUSSION

A. Legal Principles.

¶19 The right to custody of one’s child is fundamental, but it is not absolute. *Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). The superior court may establish a permanent guardianship that divests a biological parent of legal custody over his or her

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

child without terminating the parent's rights. A.R.S. § 8-872(G) (West 2013). Before the court may order a permanent guardianship, § 8-871(A) requires proof by clear and convincing evidence that

the prospective guardianship is in the child's best interests and all of the following apply:

1. The child has been adjudicated a dependent child.

2. The child has been in the custody of the prospective permanent guardian for at least nine months as a dependent child. The court may waive this requirement for good cause.

3. If the child is in the custody of the division or agency, the division or agency has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if . . . reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child.

4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests.

A.R.S. §§ 8-871(A) (West 2013), -872(F) (burden of clear and convincing evidence); Ariz. R.P. Juv. Ct. 63(C) (same). The court's primary consideration in ruling on a motion for guardianship shall be "the physical, mental and emotional needs of the child." A.R.S. § 8-871(C).

¶10 "[T]he trial court is in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004) (quotation omitted). Accordingly, we do not reweigh the evidence but determine only whether there is evidence to sustain the superior court's ruling. *Id.*

B. Child in Guardian's Custody for at Least Nine Months.

¶11 Mother argues ADES did not establish by clear and convincing evidence that Child had been in Grandmother's custody "for at least nine months as a dependent child" pursuant to § 8-871(A)(2). By the conclusion of the guardianship hearing in March 2012, Child had been in Grandmother's custody for a cumulative total of 15 months. Moreover, the statute allows the superior court to waive that requirement "for good cause," and the court's finding of good cause for such a waiver in this case is supported by the evidence.

¶12 Grandmother clearly has a familial tie with Child, and Child had been a dependent of the State for more than half of his life by the time the guardianship order was entered. Child's Court Appointed Special Advocate testified that Child and Grandmother had developed a very strong bond. The case manager also testified that if the court did not aggregate the periods of time Child spent with Grandmother, it nonetheless

should waive the nine-month requirement because he had a stable routine with Grandmother and his best interests were served in that environment, given his young age. Thus, because Child was in Grandmother's care for a significant amount of time and that placement provided "stability and . . . permanence," the superior court did not err in finding good cause to waive the nine-month requirement.

C. Reasonable Reunification Efforts.

¶13 Mother also argues ADES failed to prove it made reasonable reunification efforts and that further efforts would be unproductive pursuant to § 8-871(A)(3). She also asserts there was no basis for the superior court to waive that requirement because ADES did not establish she "was unwilling or unable to properly care" for her son.

¶14 ADES fulfills its statutory duty to provide reasonable reunification efforts when it gives the parent "the time and opportunity to participate in programs designed to help her become an effective parent." *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). The services provided must have a "reasonable prospect of success," but ADES is not required to provide services that would be futile. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 34, 971 P.2d 1046, 1053 (App. 1999).

¶15 The evidence shows ADES made reasonable efforts to reunite Mother with Child. ADES provided Mother with supervised visitation, parenting classes, drug tests, substance abuse treatment, family team meetings with a mental health provider and case management. Even when Mother tested positive for meth, the case manager remained Mother's "fiercest advocate" and sought reunification. ADES permitted Mother to have unsupervised visits with Child and in March 2011, placed him in Mother's physical custody. But Mother continued to abuse meth while Child was in her care, leading to her reincarceration and his return to Grandmother in June 2011.

¶16 While Mother focuses on the period after her most recent release from jail, the evidence supports the court's conclusion that "further efforts [to reunite] would be unproductive and/or reunification of the parent and child is not in the best interests of the child because the parent is unwilling or unable to properly care for the child." See A.R.S. § 8-871(A)(3). Despite ADES's efforts, Mother remained steadfastly opposed to any services aimed at her substance abuse and mental health issues. She denied to doctors, probation officers and in court that she used drugs, stated she would not participate in any substance abuse treatment and refused medication recommended for her mental health issues. Additionally, Mother had access to court-ordered services

through her probation, including counseling. On this record, reasonable evidence supports the superior court's findings that ADES made reasonable reunification efforts and that any further efforts would be futile.

¶17 Although Mother argues she is willing to parent Child, ADES offered evidence showing Mother is unable to properly care for Child at the present time. Mother asserts that she has "stable housing" and employment that demonstrate her ability to properly care for Child. But Mother did not have stable income and was living rent-free in the home of a friend she met in jail who was facing foreclosure.

¶18 On appeal, Mother heavily relies on the psychologist's evaluation, but that evaluation was conducted before her two positive drug tests and incarceration in June 2011. Informed in court that the two positive drug tests occurred while Child was in Mother's custody, the psychologist testified that the situation presented a "more alarming circumstance" and his prior evaluation may not have uncovered Mother's greater substance abuse problems. Additionally, the psychiatrist who evaluated Mother prior to her release from jail in September 2011 testified he had diagnosed her with a substance abuse disorder, which Mother denies, and recommended antipsychotic medication, which Mother refused.

¶19 Though Mother made progress maintaining her sobriety after her most recent release from jail in September 2011, the case manager testified she remained concerned that Mother's problems are "cyclical." Mother's periods of sobriety were interrupted by mental health issues that caused her to "decompensate into some of the same delusional, paranoid behaviors" followed by positive drug tests.

¶20 In sum, the evidence supports the superior court's conclusion that Mother's unaddressed substance abuse and mental health issues and frequent incarcerations render her unable to properly care for Child.

D. Best Interests.

¶21 Lastly, Mother asserts ADES failed to establish by clear and convincing evidence that a permanent guardianship was in Child's best interests pursuant to § 8-871(A). The superior court, however, had ample evidence supporting its best-interests determination. Three of Mother's four positive drug tests occurred while Child was in her care, she was incarcerated three times in less than two years, her living situation was unstable and Child had spent more than half his life as a dependent of the State without a stable home, which the case manager and CASA testified a permanent guardianship with Grandmother would accomplish.

CONCLUSION

¶22 We affirm the superior court's order appointing Grandmother as Child's permanent guardian.²

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Presiding Judge

/s/

MICHAEL J. BROWN, Judge

² The caption in this appeal is amended to refer to the child by his initials.