DIVISION ONE
FILED: 3/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT L., ALICIA H.,	)	1 CA-JV 12-0204
	)	
Appellants,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, BLAKE L., TRYNITY L., BRYCE L.,	)	Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
	)	
Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS11917

The Honorable Roland J. Steinle III, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellees

David W. Bell — Mesa
Attorney for Appellant Scott L.

Robert D. Rosanelli — Phoenix
Attorney for Appellant Alicia H.

B A R K E R, Judge *Pro Tempore**

¶1 Scott L. ("Father") and Alicia H. ("Mother") (collectively, "Appellants") appeal the juvenile court's order

severing their parental rights to Blake L., Trynity L., and Bryce L. (collectively, "the children") pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(2) (West 2012)[1] (providing for termination on the ground "[t]hat the parent has neglected or wilfully abused a child"). Appellants do not deny that they neglected the children; however, they argue that the juvenile court erred in terminating their parental rights because the Arizona Department of Economic Security ("ADES") failed to make diligent efforts to provide them with appropriate reunification services. Mother also argues that she was denied effective assistance of counsel during the termination proceedings. For the reasons that follow, we affirm.

BACKGROUND[2]

¶2 Appellants are the biological parents of the children, all of whom were born in 2009 or 2010. Although all of the

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[1] We cite the current Westlaw version of all statutes cited in this memorandum decision because no revisions material to our analysis have occurred since the relevant date.

[2] 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 the court's findings of fact unless no reasonable evidence supports those findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (citations omitted). Further, we view the evidence in the light most favorable to sustaining the juvenile court's decision. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005).

children were born premature, each was discharged from the hospital with no major medical complications.

¶3 In August 2011, Child Protective Services ("CPS") received a report that Bryce had been admitted to the hospital with a distended abdomen and severe constipation, and he had been diagnosed with failure to thrive, extreme developmental delays, and a rare infection only contracted in children with a low immune system who are subjected to unsanitary environments. After receiving further allegations that the children had been subjected to severe nutritional, medical, and general environmental neglect, chronic domestic violence by Father toward Mother, unsanitary and unsafe conditions throughout the home, and instability of housing, including moving at least eighteen times since 2009, CPS implemented a safety plan and investigated.[3]

¶4 During the thirty days the safety plan was in place, CPS's investigation substantiated the allegations of neglect, and Appellants continued to engage in domestic violence.[4] ADES

[3] Between October 2009 and June 2011, CPS had received eight prior reports alleging neglect, most of which CPS had been unable to substantiate. Nevertheless, the family had been receiving daycare assistance from ADES, as well as food stamps and developmental assistance for the children through the Arizona Early Intervention Program.

[4] Appellants had been involved in numerous instances of domestic violence and had recently been evicted from their home, which the former landlord described as "filthy." The carpet was covered with human and animal feces, urine, dirty diapers, old junk, food, piles of debris, and dirty clothes, and the inside

ultimately removed the children from the home and placed them in the temporary physical custody of the paternal grandparents.[5]

¶5 On September 13, 2011, ADES filed a dependency petition, alleging that Appellants had neglected the children. At the September 22 preliminary protective conference and hearing on the dependency petition, Appellants contested the petition's allegations. Initially, ADES offered Appellants reunification services, including supervised visitation, transportation, psychological evaluations, a referral for domestic violence services, hair follicle and random urinalysis testing, and substance abuse assessment and treatment. ADES also offered numerous services to the children.

¶6 Upon further investigation, ADES learned that Appellants had a history of delaying or failing to seek medical

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doorknobs to the children's bedrooms had been removed, causing the children to often be locked in their rooms screaming for hours without anyone to check on them. Neither Mother nor Father was employed or able to meet the basic needs of the children, and although the children regularly appeared to be starving, Appellants would often barter or sell their monthly allotment of food stamps. All of the children had a history of severe diaper rashes, and daycare personnel would have to provide the children with basic essentials, such as diapers and clothing, and bathe them almost daily because they smelled so badly of urine.

[5] Each of the children had significant developmental delays, numerous special needs, and post-traumatic stress disorder. In October 2011, the juvenile court granted ADES's motion to have Blake placed in the temporary physical custody of the maternal grandparents, and in April 2012, the court granted ADES's motion to have Trynity placed in the temporary physical custody of a confidential non-relative caregiver.

attention for the children, often until hospitalization became necessary due to potentially life-threatening infections or other serious illness, failing to follow through with referrals or medical advice despite "endless phone calls" and reminders from caregivers, and missing the children's appointments, including missing or delaying most of their immunizations.[6] Given the extreme neglect the children had suffered as indicated in the children's medical records, as well as the reports of chronic domestic violence, evictions, and homelessness, ADES informed the court on October 17, 2011, that it would seek a case plan of severance and adoption rather than reunification. The juvenile court had not yet addressed the issue of dependency.

¶7 On November 21, 2011, at the pretrial conference in the dependency matter, the juvenile court granted ADES leave to file a petition for termination of the parent-child relationships. ADES requested that the severance and dependency matters be heard together and also agreed to continue to offer family reunification services while the severance was proceeding.[7]

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[6] Dr. Jeffrey Maxcy, the children's pediatrician, later testified that all three of the children had been diagnosed with failure to thrive, and in the twenty-two years he had been practicing, this was "the number one case" of neglect he had seen.

[7] In November and December 2011, Appellants participated in psychological evaluations conducted by Dr. G. Joseph Bluth. Dr. Bluth opined that Appellants' insight and judgment were poor and that each had personality disorders. He further opined that

¶8 On December 9, 2011, ADES filed the petition for termination of the parent-child relationships, alleging that Appellants had neglected or wilfully abused the children. *See* A.R.S. § 8-533(B)(2). Appellants contested the case plan of severance and adoption and denied the allegations of the petition.

¶9 At a December 21 pretrial conference, the court suspended visitation between Appellants and the children. The court also ordered a consolidated hearing on the dependency and termination petitions.

¶10 Two months later, in February 2012, the Arizona Foster Care Review Board recommended that the juvenile court terminate Appellants' parental rights and expedite the children's adoptions. CPS continued to offer services to the children and services such as transportation and drug testing to Appellants, but, by the time of trial in May 2012, CPS had discontinued offering services to Appellants.

¶11 Appellants denied the allegations of the dependency petition and submitted the issue of dependency to the court. The court found the allegations of the dependency were true and adjudicated the children dependent as to Appellants.

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although both needed numerous services, they would not profit from such services or be able to parent the children in the future. Consequently, Dr. Bluth recommended that ADES consider alternative permanency plans for the children.

¶12 The court subsequently conducted the severance trial. At the conclusion of closing arguments, the court took the matter under advisement.

¶13 Later, in a detailed minute entry, the juvenile court ordered Appellants' parental rights to the children terminated pursuant to A.R.S. § 8-533(B)(2) after finding that ADES had proven by clear and convincing evidence that Appellants had neglected or wilfully abused the children. In making its ruling, the court identified numerous instances of neglect or abuse, and summarized in part as follows:

> In addition to the medical neglect, there is abundant evidence of general neglect and [Appellants'] failure to provide for the children's basic needs. Dr. Maxcy testified, to a reasonable degree of medical probability, that [Appellants'] inability or unwillingness to properly care for the children caused an unreasonable risk of harm to the children's health and welfare. Particularly alarming are the problems of domestic violence, the unsanitary conditions of the homes, multiple moves/evictions, and [Appellants'] failure to provide for the children's basic needs.

The court also noted that Father had attempted suicide twice since March 2012, and that both parents suffer from personality disorders that are not amenable to treatment and would continue to affect their ability to parent "for a long and indeterminate period of time." Additionally, the court found that severance was in the children's best interest "because it will provide them with stability, permanency, and free them from an abusive and

neglectful home," and "that all three of the children are adoptable."[8]

¶14 Appellants each filed a timely notice of appeal. We have appellate jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 8-235(A).

ANALYSIS

I. Standard of Review

¶15 The right to custody of one's children is fundamental, but it is not absolute. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). A court may order severance of parental rights under certain circumstances, as long as the parents whose rights are severed have been provided with "fundamentally fair procedures" that satisfy due process requirements. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)). To justify termination of the parent-child relationship, the juvenile court must find, by clear and convincing evidence, at least one of the statutory grounds set out in § 8-533. *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685 (citing A.R.S. § 8-533(B)). The court must also find by a

[8] At the time of the severance hearing, the children continued to be placed separately. Bryce was still placed with the paternal grandparents, Blake was placed with the maternal grandparents, and Trynity was placed with the confidential placement. Although separated, the children had sibling visits, and family members had stated a commitment to maintaining the sibling relationships.

preponderance of the evidence that termination is in the best interests of the children. *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022.

¶16 In general, we will affirm a severance order unless the findings underlying it are clearly erroneous. *See Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205; *Maricopa Cnty. Juv. Action No. JS-4374*, 137 Ariz. 19, 21, 667 P.2d 1345, 1347 (App. 1983). In conducting our analysis, we review *de novo* questions of law, including the application of statutes and rules. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 210, ¶ 18, 181 P.3d 1126, 1131 (App. 2008); *Maricopa Cnty. Juv. Action No. JV-507879*, 181 Ariz. 246, 247, 889 P.2d 39, 40 (App. 1995).

II. Efforts to Provide Appropriate Reunification Services

¶17 Appellants do not quarrel with the juvenile court's findings that they neglected the children. They argue, however, that the court erred in terminating their parental rights because ADES failed to make diligent efforts to provide them with appropriate reunification services. ADES responds that the court was not required to find that ADES made diligent or reasonable efforts to provide reunification services before terminating Appellants' parental rights on the ground of neglect.

¶18 The duty to make diligent or reasonable efforts to provide appropriate reunification services may arise through statute, *see* A.R.S. § 8-533(B)(8) and (11), or through case law

based on the recognition of a parent's fundamental constitutional rights. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 191-92, ¶¶ 29-34, 971 P.2d 1046, 1052-53 (App. 1999) (holding that, before a severance based on mental illness under A.R.S. § 8-533(B)(3) may be granted, ADES must demonstrate either that it has made a reasonable effort to preserve the family or that the parent is not amenable to any treatment program).

¶19 Subsection (B)(2) of A.R.S. § 8-533 contains no express language requiring ADES to make diligent efforts to provide reunification services before severance, however, and no Arizona court has previously read such a requirement into that subsection. *See, e.g., Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 510, ¶ 11, 200 P.3d 1003, 1007 (App. 2008) (recognizing that "neither § 8-533 nor federal law requires that a parent be provided reunification services before the court may terminate the parent's rights on the ground of abandonment"); *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶¶ 6-8, 106 P.3d 327, 328 (App. 2005) (concluding that the legislature has not imposed a statutory duty on the part of ADES to provide reunification services for a subsection (B)(4) severance and that no constitutional mandate to undertake reunification efforts may exist unless there is a reasonable prospect of success); *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 64, 66, ¶¶ 9, 15, 993 P.2d 462, 465, 467 (App. 1999) (recognizing that the legislature

amended § 8-533(B) to remove the requirement that services be provided before termination on the ground of abandonment under A.R.S. § 8-533(B)(1), and finding no constitutional duty to provide services before seeking termination on that ground).

¶20 Moreover, A.R.S. § 8-846(B)(1)(d) provides that the juvenile court need not order ADES to provide reunification services when a child has been removed from the home if the court finds by clear and convincing evidence that one or more aggravating circumstances exist, including that a child was the victim of serious physical or emotional injury by the parent, or by a person known by the parent if the parent knew or reasonably should have known the person was abusing the child. *See also* Ariz. R.P. Juv. Ct. 57. The court's severance order clearly reflects such a finding with regard to each of the children, and the court was not required in this case to make its findings before it terminated Appellants' parental rights. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 237, ¶¶ 23-24, 256 P.3d 628, 634 (App. 2011) (concluding that, because the mother failed to request a hearing to determine whether ADES could suspend services or refrain from providing them, she had waived the argument absent fundamental error, which did not exist). We conclude that, given the allegations made by ADES and the findings of the juvenile court in this case, the court was not required to find that ADES made a diligent or reasonable

effort to provide Appellants with reunification services before terminating their parental rights to the children.

¶21 Furthermore, even if we assume *arguendo* that such a finding was necessary, reasonable evidence supports the juvenile court's implicit finding that ADES made reasonable efforts to preserve the family and that any further efforts would be futile.[9]

¶22 Even when ADES has a duty to provide reunification services, ADES is not required to provide every conceivable service, *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994), or to "[l]eav[e] the window of opportunity for remediation open indefinitely." *Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 577, 869 P.2d 1224, 1230 (App. 1994). Additionally, ADES need not undertake futile rehabilitative measures, but only those that offer a reasonable possibility of success. *Mary Ellen C.*, 193 Ariz. at 187, ¶ 1, 971 P.2d at 1048. Further, although a parent is entitled to reasonable visitation in dependency proceedings, the

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[9] In its severance order, the juvenile court did not explicitly find that ADES made reasonable efforts to provide reunification services. Such a finding may, however, be implicit. *See Maricopa Cnty. Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) ("[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." (citations omitted)); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 17, 83 P.3d 43, 50 (App. 2004) ("If the juvenile court fails to expressly make a necessary finding, we may examine the record to determine whether the facts support that implicit finding.").

juvenile court may deny visitation to ensure a child's physical, mental, moral, or emotional health. *Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994).

¶23 In this case, immediately after removing the children from Appellants' care, ADES implemented a case plan of family reunification and offered Appellants numerous services, including supervised visitation, transportation, psychological evaluations, a referral for domestic violence services, hair follicle and random urinalysis testing, and substance abuse assessment and treatment. The juvenile court approved ADES's case plan, pending a dependency hearing. After reviewing the children's medical records, however, ADES concluded it had sufficient grounds to move directly to severance under § 8-533(B)(2), and ultimately filed a petition to terminate Appellants' rights on that ground. ADES alleged that Appellants had "neglected or wilfully abused the children" by inflicting "serious physical or emotional injury" upon them. Nevertheless, ADES stated it was willing to continue to provide family reunification services while the severance was pending. As a result, ADES provided Appellants with psychological evaluations, and continued to provide them with random drug testing, transportation, and supervised visitation. Although ADES later moved to suspend visitation, it did so based on reports that the children were experiencing symptoms of post-traumatic stress disorder after visiting

Appellants. After an evidentiary hearing, the juvenile court granted ADES's motion and suspended visitation between Appellants and the children.[10]

¶24 Furthermore, Dr. Bluth's psychological evaluations of Appellants indicate that further services offered by ADES would likely have been futile. Although Dr. Bluth opined that Appellants were "in need of" numerous services, including counseling, parenting-skills training, domestic violence counseling, and psychiatric services, he further opined that it was unlikely they would "profit from such training given the history of this case" or be able to parent the children in the future. Consequently, Dr. Bluth recommended that ADES "consider alternative permanency plans for the children."[11] Given the facts of this case, we conclude that reasonable evidence supports an implicit finding that ADES made reasonable efforts to reunify the family and that further efforts would have been futile.

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[10] Appellants did not appeal the court's order denying them visitation. *See JD-5312*, 178 Ariz. at 374-75, 873 P.2d at 712-13 (holding that an order terminating visitation is a final appealable order).

[11] Father suggests that ADES could have sought severance on the ground of mental illness, and he notes that had it done so, he may have been afforded greater protection in the form of more services. Nothing requires ADES to allege every possible ground for severance, however, and ADES need only establish one of the statutory grounds set out in § 8-533. *See Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685.

III. Mother's Ineffective Assistance of Counsel Claim

¶25 Mother also argues she was denied effective assistance of counsel during the severance proceedings. She bases her claim on the fact that her attorney failed to properly disclose her expert witness, Dr. Charles Hyman, to opposing counsel, and the juvenile court therefore precluded Dr. Hyman's testimony and the admission of Dr. Hyman's report in evidence.[12] She also argues her counsel should have provided Dr. Hyman with additional information beyond the children's medical records.

¶26 In severance proceedings, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 324, ¶ 14, 173 P.3d 1021, 1025 (App. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). To establish ineffective assistance of counsel, a party must show both that the attorney's representation fell below prevailing professional norms and that a reasonable probability

[12] Mother filed her list of witnesses and exhibits on May 29, 2012 - two days before trial. Dr. Hyman was listed as a witness who would "testify regarding the medical care [Mother] obtained for the children regarding their medical conditions," and his report was listed as an exhibit. ADES moved to preclude Mother's evidence and witnesses on the basis that she had failed to timely file her disclosure statement or provide ADES with any documentary evidence. *See* Ariz. R.P. Juv. Ct. 44(D). ADES argued it therefore lacked time to adequately prepare for trial. At the severance hearing, the court precluded from evidence Dr. Hyman's report and testimony due to Mother's counsel's failure to timely disclose the doctor and his report, but accepted the report as an offer of proof for the appellate record.

exists that, but for the attorney's errors, the result of the proceeding would have been different. *Id*. at 325, ¶¶ 17-18, 173 P.3d at 1026; *accord Strickland*, 466 U.S. at 690-94 (1984). Further, to establish prejudice, Mother must do more than show counsel's errors had some conceivable effect on the proceeding's outcome. *See State v. Whalen*, 192 Ariz. 103, 110, 961 P.2d 1051, 1058 (App. 1997). She must demonstrate "that the severance proceedings in this case were fundamentally unfair; that the result of the hearing is unreliable; or that, had counsel conducted himself differently, the juvenile court would have reached a different result." *John M.*, 217 Ariz. at 325, ¶ 19, 173 P.3d at 1026.

¶27 This issue is readily resolved by Mother's failure to show any prejudice resulting from her counsel's performance. *See id*. at ¶ 18. That is, even if we were to assume Mother's counsel's performance fell below an objective standard of reasonableness, Mother cannot demonstrate there was a reasonable probability that, but for her counsel's errors, the outcome would have been different. Mother speculates that Dr. Hyman could have "offered other information to the court," but she fails to specify what further testimony Dr. Hyman could have offered at trial. Additionally, Dr. Hyman's report offers little insight. The report merely recites the contents of the children's medical records and offers no opinion as to whether they were neglected

or whether an alternative theory exists for their conditions. Moreover, as we have recognized, Mother has failed to challenge the court's numerous findings of neglect and abuse, including the finding that Appellants "failed to make and attend critical medical appointments and follow through on crucial medical treatments for each child," and that their "inability or unwillingness to properly care for the children caused an unreasonable risk of harm to the children's health and welfare." Because Mother offers little more than speculation, she has failed to demonstrate that she has been prejudiced. Consequently, we find no merit to her claim that she received ineffective assistance of counsel.

CONCLUSION

¶28 The juvenile court's order terminating Appellants' parental rights to the children is affirmed.

/S/
DANIEL A. BARKER, Judge *Pro Tempore*

CONCURRING:

/S/
PATRICIA A. OROZCO, Presiding Judge

/S/
PETER B. SWANN, Judge

*The Honorable Daniel A. Barker, Judge *Pro Tempore* of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147.