IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

SONDRA M., RAFAEL A., *Appellants*,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, A.M., *Appellees*.

No. 1 CA-JV 13-0051
FILED 11-21-2013

Appeal from the Superior Court in Maricopa County
No. JD16570
The Honorable Aimee L. Anderson, Judge

AFFIRMED

COUNSEL

John L. Popilek, P.C., Phoenix
By John L. Popilek

Counsel for Appellant Mother

Maricopa County Public Advocate, Mesa
By Suzanne Sanchez

Counsel for Appellant Father

Maricopa County Legal Advocate, Phoenix
By Joliene D. Konkel

Guardian Ad Litem

Arizona Attorney General's Office, Phoenix
By Cathleen E. Fuller, Tucson

Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Maurice Portley delivered the decision of the Court, in which Judge John C. Gemmill and Judge Kent E. Cattani joined.

P O R T L E Y, Judge:

¶1 Sondra M. ("Mother") and Rafael A. ("Father") appeal the termination of their parental rights to their child, A.M. ("child"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Child Protective Services ("CPS") removed the child from her parents a week after birth. The Arizona Department of Economic Security ("ADES") filed a dependency petition alleging that the child was in need of care because of Mother's mental deficiency and Father's mental illness and substance abuse. The juvenile court subsequently found the child dependent, and approved the concurrent case plan of family reunification and severance and adoption.[1]

¶3 ADES offered Mother services, including visitation, a parent aide, transportation, psychological evaluations, and individual and couples counseling. Father was offered the same services, and participated in a paternity test, substance abuse treatment, and urinalysis testing.

¶4 At the August 2012 report and review hearing, the parents complained that they were not getting medical training to meet their child's medical needs. The court "ORDERED that any medical training the parents need to know in order to parent the child be addressed

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[1] The CPS case notes reflect that the concurrent plan was approved because the parents had lost their parental rights to two other children.

immediately." The court also granted the child's guardian ad litem ("GAL") leave to file a motion to sever the parents' parental rights. Two weeks later, and before the parents had received meaningful training on how to feed their special medical needs child using a medical device called a G-tube, the GAL filed the termination motion.

¶5 The juvenile court conducted a four-day hearing in January 2013, and issued an unsigned minute entry severing the rights of the parents to their child. Specifically, the court found that severance was warranted under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(3) (West 2013) because Mother was unable to care for the child because of her mental illness or deficiency, and under A.R.S. § 8-533(B)(8)(c) (West 2013), because the child had been out of the care of both parents for fifteen months or longer. The court also directed the GAL to submit findings of fact and conclusions of law.

¶6 The parents filed their notices of appeal from the unsigned minute entry. The court signed the findings of fact and conclusions of law submitted by the GAL on June 3, 2013. Father filed an amended notice of appeal, but Mother did not.

DISCUSSION

I. Appellate Jurisdiction Over Mother's Appeal

¶7 ADES argues that because Mother did not file a timely amended notice of appeal after the juvenile court signed the findings of fact and conclusions of law, we lack jurisdiction to review her appeal.[2]

¶8 We have an independent duty to assess whether we have appellate jurisdiction. *Ghadimi v. Soraya*, 230 Ariz. 621, 622, ¶ 7, 285 P.3d 969, 970 (App. 2012). Generally, we lack jurisdiction over a notice of appeal filed before entry of a final judgment because it is premature. *Id.* at 622, ¶ 8, 285 P.3d at 970. A juvenile court order is final when in writing and signed by the judge. Ariz. R.P. Juv. Ct. 104(A).

[2] ADES does not challenge our jurisdiction over Father's amended notice of appeal.

¶9 However, our supreme court in *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415, ¶ 37, 132 P.3d 1187, 1195 (2006)) stated, "*Barassi* [*v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981)], create[d] only a *limited exception* to the final judgment rule that allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial." In *Barassi*, we recognized that although the litigant filed a notice of appeal from the unsigned denial of a motion for new trial, we had jurisdiction over the premature notice. 130 Ariz. at 419, 422, 636 P.2d at 1201, 1204; *see also Ghadimi*, 230 Ariz. at 623-24, ¶ 13, 285 P.3d at 971-72 (noting that we can exercise appellate jurisdiction from a premature notice of appeal so long as the court does not exercise judgment or discretion and the only remaining task is ministerial). If the signed order or judgment is consistent with the unsigned minute entry, the court's task was ministerial and we can exercise jurisdiction. *See Baker v. Bradley*, 231 Ariz. 475, 482, ¶ 26, 296 P.3d 1011, 1018 (App. 2013).

¶10 Here, Mother's notice of appeal was premature. The juvenile court instructed the GAL to prepare the findings of fact and conclusions of law consistent with trial evidence, and later signed the document. Although Mother could have challenged the findings or conclusions, her lawyer had been relieved in the unsigned minute entry and there was no one to advocate on her behalf. As a result, the court only exercised its ministerial authority, not discretionary authority, when signing the judgment terminating the rights of the parents on June 3, 2013.[3] Consequently, and pursuant to the *Barassi* exception, we have jurisdiction over Mother's appeal.

[3] To the extent that a juvenile court will review submitted findings of fact and conclusions of law after an unsigned ruling, the better practice would be to not allow the lawyer for the parent to withdraw until the final signed order has been filed so that the lawyer can, if appropriate, challenge the proposed findings of fact and conclusions of law, seek post-trial relief, or file a timely appeal.

II. Standard of Review

¶11 In reviewing a parental termination, we are mindful that the juvenile court must find clear and convincing evidence to support the statutory basis for the severance. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court, however, applies a preponderance of the evidence standard in determining whether severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We view the evidence, and any reasonable inferences, in the light most favorable to sustaining the juvenile court's order. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18, 219 P.3d 296, 303 (App. 2009). We will also "accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

III. Diligent Effort and Medical Training

¶12 Both parents contend that there was insufficient evidence to sever parental rights based on the fifteen months or more time in care. Specifically, they argue that ADES did not make a diligent effort to provide appropriate reunification services because parents were not given adequate opportunity to be trained to be able to meet the medical needs of their child.[4]

¶13 The child has significant medical issues. ADES provided multiple services to the parents, including visits with their child and access to the child's appointments with her doctor. A medical instrument called a G-tube was inserted to facilitate feeding the child in April 2012. The parents were not provided with any training to operate the device, so they asked for the training at the August 2012 report and review hearing and the court ordered the training. In the short time before the severance adjudication began, ADES called two hospitals in an unsuccessful attempt to find training for the parents, but then suggested that the child's doctor could provide the training. The doctor testified, however, that she could not provide the equivalent of two-to-three days of training on the use and

[4] ADES contends that the parents waived the challenge by not objecting to the services at any report and review hearing. The parents preserved the issue by objecting to the sufficiency of services during the adjudication.

care of the device by merely answering questions from the parents during short medical visits.[5]

¶14 Based on this record, we will assume for the purpose of argument that ADES did not provide reasonable medical training services to the parents as part of the reunification process. ADES, however, need not provide every conceivable service, *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994), and does not need to provide services that will be futile. *Maricopa County Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 189, 692 P.2d 1027, 1038 (App. 1984).

¶15 Here, the juvenile court heard testimony that further services would be futile given the parents' mental limitations. Joseph Bluth, Ph.D., psychologist, testified that neither parent would benefit from G-tube training. He testified that Father has borderline intellectual functioning; would have trouble understanding new information and multi-step procedures; and would be incapable of increasing his mental functioning with more services.[6] Dr. Bluth also testified that Mother had mild mental retardation; that she would have trouble learning information and applying it to new situations, that she would struggle with anything more than a one-step instruction, and more services would not overcome her limitations caused by mental retardation. Although Mother presented evidence that she is certified in CPR and First Aid, the juvenile court had to resolve any conflicts in the evidence, and we decline to re-weigh that evidence. *Vanessa H.*, 215 Ariz. at 257, ¶ 22, 159 P.3d at 567.

¶16 Although ADES did not provide medical G-tube training, ADES demonstrated that it would have been futile to provide that additional service. Consequently, we find no error with the court's conclusion that the parental rights of both parents should be terminated on the basis that the child was out of the parents' care for fifteen months

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[5] The court did not inquire about the status of its order before the adjudication.

[6] Although Dr. Bluth had evaluated Father two years earlier, he testified that people with profiles like Father's are "not going to show a great deal of change." And even though Dr. Bluth said functioning may increase with Father's depression being lifted, we defer to the juvenile court's resolution of conflicting testimony. *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 257, ¶ 22, 159 P.3d 562, 567 (App. 2007).

or longer and there is a substantial likelihood that the parents would not be capable of exercising proper and effective parental care and control in the near future.

IV. Mother's Evidentiary Claim

¶17 Mother argues that Dr. Bluth's testimony should not have been allowed because it lacked foundation. We review the admission of expert testimony for an abuse of discretion. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352, ¶ 6, 166 P.3d 140, 143 (App. 2007).

¶18 Dr. Bluth evaluated and testified about both parents. During the adjudication, the GAL asked Dr. Bluth whether he believed Mother could parent the child given the child's medical needs. Mother objected to the question as speculative. Mother did not, however, object on the basis that Dr. Bluth's testimony lacked foundation. The court overruled the proferred objection, which did not preserve any other objection that could have been made. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982); *see State v. Lopez*, 217 Ariz. 433, 434, ¶ 4, 175 P.3d 682, 683 (App. 2008) (noting that the purpose of an objection is to give notice of a potential defect to allow the other party to attempt to correct the error). Consequently, because Mother waived her foundation objection, we need not consider the issue.

V. Mother's Due Process Claim

¶19 Mother also argues that her due process rights were violated because her rights to be a parent were severed just because she is mentally retarded. She failed to make the argument to the juvenile court, however, and she has thus waived this issue. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 44 n.3, ¶ 19, 178 P.3d 511, 516 n.3 (App. 2008) (citing *Paloma Inv. Ltd. v. Jenkins*, 194 Ariz. 133, 137, ¶ 17, 978 P.2d 110, 114 (App. 1998)).

¶20 Mother contends that her counsel argued at the hearing that her due process rights would be violated by severance based solely on mental retardation. A general statement in opening statement and closing argument that all parents have a constitutional right to parent their children is insufficient, however, to make or preserve the argument for appeal. Moreover, we are unaware of any jurisdiction that has found a statute authorizing termination of parental rights because of mental illness

or deficiency unconstitutional where it is in the child's best interest and parent is incapable of proper parenting in the near future.[7] Consequently, and because Mother's rights were terminated under § 8-533(B)(8)(c), we will not address the issue.

CONCLUSION

¶21 Based on the foregoing, we affirm the termination of the parental rights of the parents to their child.

[7] We have reviewed the cases Mother cited in her reply brief. None of them preclude the termination of Mother's rights given Arizona's statutory framework that ADES has to prove a statutory basis and that termination is in the child's best interests.