IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HORTENCIA R., M.I., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY, N.I. BARBARA C., *Appellees*. [1]

No. 1 CA-JV 15-0215
FILED 2-11-2016

Appeal from the Superior Court in Maricopa County
No. JD508171
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

Robert D. Rosanelli, Phoenix
Counsel for Appellant M.I.

Vierling Law Offices, Phoenix
Tom A. Vierling
Counsel for Appellant Hortencia R.

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[1] The caption has been amended to safeguard the child's identity pursuant to Administrative Order 2013-0001.

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Randall M. Howe joined.

T H U M M A, Judge:

¶1 Hortencia R. (Mother) appeals from a decision denying her petition for termination of a Title 8 guardianship of her minor children M.I. and N.I. M.I. also appeals from the decision. Because the record supports the decision, it is affirmed.

FACTS[2] AND PROCEDURAL HISTORY

¶2 M.I. was born in 1999 and N.I. was born in 2003. The Department of Child Safety (DCS) removed the children from Mother's care and filed dependency petitions three different times, the first occurring approximately a decade ago. The children's father is serving a 100-year plus prison term and is not a party to this appeal. In November 2012, after the third removal (based on allegations Mother was unable to parent due to substance abuse, neglect and mental health issues), the superior court appointed the children's paternal grandmother as their guardian. *See* Arizona Revised Statutes (A.R.S.) §§ 8-871, -872 (2016).[3] In November 2013, the superior court affirmed the guardianship, finding it was still warranted to further the best interests of the children.

¶3 In March 2014, Mother filed a petition for termination of guardianship. The court conducted an adjudication on the petition, where Mother testified she has a stable, safe home and is parenting a young son. Mother testified she would be able to get M.I. and N.I. the medical care they need and would keep them in the same schools they were attending if the

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[2] This court views the evidence in the light most favorable to sustaining the superior court's findings. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207 ¶ 2 (App. 2008) (involving severance of parental rights).

[3] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

guardianship were terminated. Mother testified that she plans to continue counseling and receives monthly social security benefits.

¶4 Other evidence at the hearing demonstrated that N.I. has substantial behavioral health and special needs that Mother would have difficulty meeting. Counselors testified to N.I.'s need for stability and that the guardian's home is his safe place. Evidence indicated that N.I. will need years of therapy to process childhood traumas and is not ready to spend more than a few hours every other week with Mother.

¶5 Evidence at the hearing indicated that, in late 2012 or early 2013, M.I.'s older half-brother touched her inappropriately. Although M.I. told her guardian about the inappropriate touching in 2014, the guardian did not report the assault, leaving that decision to M.I. The guardian did, however, confront the half-brother and his mother, and did not allow the half-brother near M.I. again. M.I. told Mother about the touching and, later in 2014, M.I. began living with her maternal grandmother.

¶6 Mother testified that, for six or seven weeks starting in December 2014, M.I. lived with her and "she was great." Mother reported the assault against M.I. to the police in late 2014. After an investigation by DCS, the case manager found there was no evidence to show the guardian failed to protect M.I. In February 2015, however, the court entered an order placing M.I. in the physical custody of maternal grandmother. Neither M.I. nor N.I. testified at the hearing.

¶7 DCS and the guardian ad litem for the children (GAL) opposed Mother's petition, arguing Mother had not shown a significant change in circumstance and that N.I. should continue living with the guardian. Although both DCS and the GAL agreed that the maternal grandmother should be appointed successor permanent guardian for M.I., the superior court noted no petition for successor guardian had been filed. The guardian had no objection to terminating the guardianship for M.I. "[i]f that's what [M.I.] wants," but argued Mother had not shown that N.I.'s guardianship should be terminated. Father did not object to terminating M.I.'s guardianship, as long as she went to live with a family member, but wanted the guardianship for N.I. to remain in place.

¶8 After considering the evidence and arguments presented, the superior court denied Mother's petition. The court found Mother did not prove a significant change of circumstances by clear and convincing evidence and did not prove that termination of the guardianship would be in the best interests of the children. This court has jurisdiction over the

timely appeals by Mother and M.I. pursuant to A.R.S. §§ 8-235, 12-120.21(A)(1) and -2101(A)(10) and Arizona Rules of Procedure for the Juvenile Court 103-04.[4]

DISCUSSION

I. The Superior Court Did Not Err By Denying Mother's Petition To Terminate The Guardianship.

¶9 The superior court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93 ¶ 18 (App. 2009) (internal quotations omitted). This court will affirm an order denying a petition for termination of guardianship "unless no reasonable evidence supports [the superior court's] findings." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555 (App. 1997). For her petition to be successful, Mother was required to show: (1) by clear and convincing evidence, "a significant change of circumstances" (i.e., that Mother was "able and willing to properly care for the" children or that the guardian was unable to do so); and (2) that termination of the guardianship was in the children's best interests. A.R.S. § 8-873(C), (A).

A. The Superior Court Did Not Err By Finding Mother Failed To Prove A Significant Change Of Circumstances.

¶10 The superior court found Mother did not prove that she was able to properly care for M.I. and N.I. or that the guardian was unable to do so. Consistent with the counselors' testimony, the court found N.I. "needs more time to visit with Mother and adjust to her and any new surroundings," and therefore "is not able to pick up and move in with Mother today." Absent a period of transition with successful extended visits with N.I., "Mother will not be able to demonstrate that she can parent him and meet his many needs." The court also determined that "while [M.I.] stayed with Mother for a few weeks . . . , that time alone does not demonstrate that Mother would be available for M.I.'s daily and

[4] DCS filed a notice that it will not participate in briefing on appeal. Although added as a party to the appeal, the guardian did not file an answering brief. Accordingly, and noting the appeal involves the best interests of children, the court addresses the appeal on the merits considering the opening briefs and the record. *In re Marriage of Diezsi*, 201 Ariz. 524, 525 ¶ 2 (App. 2002).

educational needs on a regular and continuing basis." The record supports these findings by the superior court.

¶11 The superior court also properly rejected Mother's claim that the guardian was unable to properly care for the children. The court concluded the guardian "attended to all of N.I.'s special needs" and was able to properly care for him. Evidence at the hearing showed N.I. considered the guardian's home his safe place.

¶12 The court found the guardian provided for M.I.'s daily needs and did not fail to protect M.I. Although the guardian did not report the assault against M.I. to proper authorities, the guardian immediately took action that kept the half-brother away from M.I. DCS also concluded that no evidence showed that the guardian did not protect M.I. The guardian's testimony that the guardianship should be terminated "[i]f that's what [M.I.] wants, yes," did not compel the court to grant the petition and did not indicate that the guardian was unwilling to continue to serve as guardian for both children. *See* Ariz. R.P. Juv. Ct. 63.1(A) (allowing for appointment of successor permanent guardian if the appointed guardian "is unable or unwilling to continue to serve as permanent guardian"). Nor has Mother shown the superior court erred in finding that the guardian's 1999 felony drug conviction, vacated in 2001, or reports from the GAL's assistant demonstrated the guardian was unable to care for the children.

¶13 The superior court ultimately concluded that the guardian has properly cared for the children, that she has no issues that prohibit her from being a proper caregiver and that she is able to properly care for the children, including their daily needs. The record supports these findings. For these reasons, Mother has not shown that the superior court's finding that she failed to prove a significant change in circumstances by clear and convincing evidence was an abuse of discretion. *See* A.R.S. § 8-873.

B. The Superior Court Did Not Err By Finding Mother Failed To Prove Termination Of The Guardianship Was In the Children's Best Interests.

¶14 Although acknowledging the children love Mother, the superior court found that termination of the guardianship was not in the best interests of the children. The court found that the guardian had met all of N.I.'s daily needs for three years and that, given his special needs, "any move from his current environment will set N.I. back in his treatment." As to M.I., who was living with her maternal grandmother at the time of hearing, because Mother had not shown a cognizable change in

circumstances such that she could properly parent the children, the court found it was in M.I.'s "best interest that the guardianship remains." Mother and M.I. challenge these findings on appeal.

¶15 In addressing the best interests finding, Mother argues on appeal that she has shown an ability to care for the children. Although the superior court received evidence that the children are having appropriate contact with Mother and want to live with her, those good contacts and earnest desires do not mandate a different best interests finding. Moreover, the fact that M.I. is living with another relative does not absolve the guardian of responsibility pursuant to A.R.S. § 8-873. Finally, neither Mother nor M.I. have shown that the court abused its discretion in addressing the conflicting evidence regarding best interests. Accordingly, the court did not err in assessing best interests. *See* A.R.S. § 8-873.

CONCLUSION

¶16 The superior court's order denying Mother's petition for termination of guardianship is affirmed.