IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JENNIFER R., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.W., *Appellees*.

Nos. 1 CA-JV 17-0232 and 1 CA-JV 17-0356
Consolidated
FILED 6-5-2018

Appeal from the Superior Court in Mohave County
No. L8015JD201607040
The Honorable Douglas Camacho, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Mohave County Legal Defender's Office, Kingman
By Eric Devany
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Ashlee N. Hoffmann
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jon W. Thompson and Judge James P. Beene joined.

S W A N N, Judge:

¶1 Jennifer R. ("Mother") separately appeals two superior court orders (1) terminating the state's obligation to provide reunification services under A.R.S. § 8-846(D) and (2) severing her parental rights to her son, S.W. We consolidated Mother's appeals, and we affirm because reasonable evidence supports both orders.

FACTS AND PROCEDURAL HISTORY

¶2 Mother gave birth to S.W. in November 2016.[1] Mother is also the biological parent of eight other children, none of whom were in her care when S.W. was born. Mother had her parental rights to two of her children severed in early 2016 due to her mental health issues.

¶3 Mother has had mental health issues since childhood when she was diagnosed with Post-Traumatic Stress Disorder and a personality disorder. Since having children, Mother has participated in several mental health evaluations. Dr. Frances Robbins opined in 2015, based on Mother's most recent psychological evaluation, that "[a]n individual with [Mother's illnesses] most likely would have difficulty parenting independently and consistently." Although a couple of reports have found that Mother may be able to benefit from treatment for her mental issues, the majority of reports, including those that were favorable to Mother, ultimately concluded that her personality disorder is of such a magnitude that it is most likely resistant to treatment, and that her ability to effectively parent in the future is "grim." Mother has also had issues with maintaining consistent employment and housing.

¶4 Shortly after S.W. was born, Arizona's Department of Child Safety ("DCS") received reports from the hospital where S.W. was born that Mother was exhibiting signs of mental illness — she was attempting to give S.W. away and telling staff that "everyone was attempting to kidnap

[1] S.W.'s alleged father is not a party to this appeal.

[him]." DCS immediately began an investigation, and visited Mother's home several days later, on November 21. During the home visit, the investigator noted that Mother was holding and feeding S.W. inappropriately by letting S.W. nearly slide off of her shoulder while holding him and by bouncing him while feeding, causing the bottle to hit him in the face. The investigator also noted that another child in the room — not a child of Mother's, but for whom Mother was partially responsible — got into a bag and was eating cigarettes until the investigator noticed and pointed it out. Mother told the investigator that the child had eaten cigarettes before.

¶5 The DCS report given to the investigator noted Mother's history with mental illness, which the investigator discussed with Mother during the visit. Mother denied having serious issues, asserting that she was "not crazy," that she did not need mental health services, and that she was able to care for S.W. The investigator was also concerned by Mother's insistence that she had "cracked the case" of a missing person in the Kingman area, and that she was working on another missing person's case.

¶6 Considering what had happened during the home visit, in conjunction with Mother's mental health issues, DCS took S.W. into custody at the conclusion of the home visit. Within the next two days, DCS received a call from Mohave Mental Health, informing them that Mother had attempted suicide, and that she was telling people that two women had "kidnapped" her son. One week later, DCS filed a report with the superior court explaining the circumstances of the removal and, with regard to its proposed case plan, asserted that "[t]here are no services that [it] can provide to eliminate the need for out of home placement," and that "visits between [S.W.] and [Mother] are [not] in [S.W.'s] best interest."

¶7 On December 8, the court ordered that Mother receive visits with S.W. "[p]ursuant to [the] Pre-Hearing Conference Agreement." The Agreement did not offer visitation for Mother at that time. Then, on January 23, 2017, DCS filed a motion requesting, under A.R.S. § 8-846(D)(1),[2] that the court relieve it of its obligation to provide reunification services to Mother because doing so would be futile, given Mother's history. The court held a hearing on the motion in March 2017. At the close of the hearing, the court orally granted DCS's motion, holding that it had met its burden for three different bases under § 8-846(D)(1), including that Mother suffered from a mental illness that would prevent her from

[2] DCS's motion cites to a previous version of the statute. Absent material revisions, we cite a statute's current version.

adequately parenting within the next 12 months. Mother appealed from that order — the first of her two appeals.

¶8 The same month as the hearing on services, DCS filed a petition to sever Mother's parental rights based on her mental health issues, her previous severances for the same cause, and the best interests of S.W. The court held a contested severance hearing in July 2017. At the close of the hearing, the court granted the severance, finding that DCS had offered sufficient evidence for termination on mental illness and prior termination grounds. The court issued its findings of fact and conclusions of law shortly thereafter. Mother appealed from the severance order — her second appeal.

DISCUSSION

¶9 Mother's appeals challenge two superior court orders — the first relieving DCS of its obligation to provide reunification services, and the second severing Mother's parental rights to S.W.[3] We review both orders for abuse of discretion, and will not disturb the superior court's disposition "unless [its] findings of fact were clearly erroneous, i.e., there is no reasonable evidence to support them." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). Because the superior court is in the best position to weigh the evidence, we view the evidence in the light most favorable to sustaining its ruling. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18 (App. 2009).

I. REASONABLE EVIDENCE SUPPORTED THE COURT'S ORDER RELIEVING DCS FROM PROVIDING REUNIFICATION SERVICES UNDER A.R.S. § 8-846(D)(1)(b).

¶10 Once DCS removes a child from the parent's home, the superior court generally must order that DCS make reasonable efforts to provide reunification services to the child and his parent. A.R.S. § 8-846(A); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 34 (App. 1999) (fundamental liberty interests require that DCS provide reasonable reunification services before seeking a severance on mental illness grounds). However, the court may relieve DCS of its obligation to offer reunification services, including visitation, if sufficient evidence shows that continued efforts would be futile. *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 236, ¶ 20 (App. 2011); *see also Francisco F. v. Ariz. Dep't Econ. Sec.*,

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[3] Mother does not appeal the court's determination that severance of her rights was in S.W.'s best interests.

228 Ariz. 379, 381, ¶ 8 (App. 2011) ("[V]isitation is considered a reunification service."). Reflecting this principle, A.R.S. § 8-846(D) provides multiple statutory bases, or "aggravating circumstances," by which DCS may seek to terminate its obligation to provide reunification services because doing so would be futile. *See* Ariz. R.P. Juv. Ct. 57 ("Services to the child and the parent designed to facilitate the reunification of the family are not required if the court, after hearing, finds the existence of certain aggravating circumstances, as set forth by law.").

¶11 Here, the superior court terminated DCS's obligation to provide services based on three aggravating factors — mental illness, prior termination for the same cause, and several prior terminations — under A.R.S. § 8-846(D)(1)(b), (e), and (f), respectively. Mother contends that the court's order was error for several reasons.

¶12 First, Mother broadly argues that there was insufficient evidence to support the court's finding that services would be futile on mental health grounds. To end its obligation to provide services based on the parent's mental illness, DCS must show by clear and convincing evidence that the parent "suffer[s] from a mental illness or mental deficiency of such magnitude that it renders [her] incapable of benefitting from reunification services," and that, even with services, the parent will not be able to adequately care for the child within one year of the child's removal from the home. A.R.S. § 8-846(D)(1)(b). The court's finding must be "based on competent evidence from a psychologist or physician." *Id.*

¶13 Mother points to a 2011 evaluation by Dr. Daniel Overbeck, which opined that it may be possible for Mother to change her behavior patterns enough to "function adequately in a maternal role," and to a 2015 opinion by Dr. Frances Robbins that change might be possible if she shows "consistent and dedicated effort" and there is "consistent monitoring through a mental health agency." But the predominant theme of each evaluation, including those cited by Mother, is that there is a low likelihood that her mental health could improve to the extent necessary to become a fit parent. For instance, Dr. Overbeck's 2011 evaluation concluded that "it [was] not likely that any pattern of services/supports—however intensive and sensitive—would be able to facilitate changes/improvements in [Mother's] parenting attitudes and skills sufficient to allow her to safely, consistently and effectively parent any of her children." And the 2015 report from Dr. Robbins concludes that "the unfortunate situation is that the recommendations for treatment are apt to be insufficient."

¶14 The less optimistic opinions from Dr. Overbeck and Dr. Robbins reflect the consensus of Mother's evaluators: In 2002, Dr. Ronald Smith diagnosed Mother with a personality disorder characterized by "histrionic, immature and dependent features"; a 2010 psychological evaluation concluded "[Mother's] prognosis is 'grim' for being able to parent in the foreseeable future"; in 2014, Dr. Joel Parker noted that Mother suffered mental health issues since childhood and concluded that "[t]here are no psychiatric services that are likely to improve her condition"; and when Mother was evaluated by Dr. Overbeck a second time in 2014, he confirmed his 2011 conclusion that she was "not likely to substantially change her internalized working model of the world—or her behaviors that are a consequence of that model." Although the most recent evaluation occurred two years before S.W.'s birth, DCS conducted a consultation in June 2016, while Mother was pregnant with S.W., and determined that further evaluations would not be necessary because services would not create a change in Mother's behavior.

¶15 DCS also presented testimony about the initial visit to Mother's home in November 2016, when it decided to take S.W. into custody. During the visit, Mother was holding S.W. inappropriately despite instruction, and shaking S.W. while feeding him causing the bottle to hit him in the face. The investigator also noticed another child with a soiled diaper eating cigarettes from someone's bag. Although Mother was not that child's primary caregiver, she was partially responsible for the child and did not notice the child eating the cigarettes until after the investigators brought it to her attention.

¶16 To the extent the more favorable statements offered by Mother conflict with the more "grim" statements discussed above, we defer to the superior court's findings, and will not reweigh the evidence. *See Mary Lou C.*, 207 Ariz. at 47, ¶ 8. The evidence here not only supports that Mother suffered from serious mental health issues preventing her from being an effective parent, but that, because the issues spanned several years and multiple severances, she was unlikely to improve enough to be able to parent within one year of S.W.'s removal. *See* A.R.S. § 8-846(D)(1)(b). The court therefore had sufficient evidence to find the existence of the mental health aggravating factor. *See id.* And because we find that sufficient evidence supports one ground for terminating services, we need not consider the other grounds. *See Mary Lou C.*, 207 Ariz. at 49, ¶ 14.

¶17 Second, related to her insufficient evidence argument, Mother argues that the superior court was required to find that continued visitation would endanger S.W. before it could restrict her constitutionally protected

interest in maintaining contact with him. *See Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, 201, ¶ 11 (App. 2002) ("A court may properly restrict or terminate a parent's visitation rights only if visitation endangers the child."). Because the court did not make any explicit findings as to S.W.'s endangerment, Mother argues the court abused its discretion by granting DCS's motion to end services.

¶18 Relying on *Michael M.*, Mother essentially argues that A.R.S. § 8-846(D) is unconstitutional because it permits a court to terminate a parent's right to visit her child without requiring a finding that continued visitation would endanger the child. Arizona's statutory scheme encompasses a parent's fundamental right to "the companionship, care, custody, and management of his or her children," *Michael M.*, 202 Ariz. at 200, ¶ 8 *(*quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)), and only restricts a parent's right to visitation "under extraordinary circumstances." *Maricopa Cty. Juv. Action No. JD-5312*, 178 Ariz. 372, 375 (App. 1994). The constitutional implications of a parent's right to visitation, however, do not require DCS "to undertake rehabilitative measures that are futile." *Mary Ellen C.*, 193 Ariz. at 192, ¶ 34.

¶19 Here, the superior court found by clear and convincing evidence that providing services to Mother, including visitation, would be futile in accordance with § 8-846(D)(1)(b). As discussed above, the court considered evidence relating to Mother's inability to safely and properly care for S.W. The court's statutorily required findings satisfied the constitutional requirements for restricting Mother's right to visit S.W. *See Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 78, ¶ 6 (App. 2005) ("Although a parent's right to care, custody, and control of his or her children has long been recognized as fundamental, it is not absolute.").[4]

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[4] To hold otherwise would undo the parental severance statutory scheme in Arizona. If the state cannot restrict a parent's visitation with her child unless it can show that the child would be endangered by even supervised visits with the parent, then it naturally follows that the state cannot sever parental rights without making the same showing. The statutory grounds for severance do not require such a strict showing, *see* A.R.S. § 8-533, and they have consistently been upheld as constitutional, *see Linda V.*, 211 Ariz. at 78, ¶ 6; *see also Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.") (quoting *Santosky v. Kramer*, 455 U.S. 745, 760 (1982)).

¶20 Third, Mother argues that she was not provided adequate services in the interim period between when S.W. was removed from her custody in November 2016, and when the court ruled that reunification services were futile in March 2017.

¶21 Aside from case management, DCS did not provide Mother with any reunification services for S.W. But DCS made it clear that it believed reunification services would be futile from its first report to the superior court. The court's order from the preliminary protective hearing required DCS to provide visitations "[p]ursuant to [the] Pre-Hearing Conference Agreement," but in that agreement, DCS asserted it was not offering visitation at that time, to which Mother took no position. DCS moved to terminate services on January 23, 2017, two months after it took custody of S.W. Then, on March 21, the court held a hearing and found that, based on Mother's mental health history and DCS's initial visit to Mother's home in November 2016, services were futile under § 8-846(D).

¶22 DCS acted reasonably here, seeking the court's authorization to end services within two months of removing S.W. *Cf. Mary Ellen C.*, 193 Ariz. at 192, ¶ 35 (holding that it is inadequate for DCS to offer "no significant reunification services for almost a year after removing [the child]"). Although it is ultimately the court — not DCS — that must determine whether services will continue, *see* A.R.S. § 8-846(A), DCS is not required to offer services that do not have a reasonable prospect of success. *Mary Ellen C.*, 193 Ariz. at 192, ¶ 34. In these circumstances, DCS did not deny Mother her rights by withholding reunification services in the months before obtaining an order relieving it from its obligation. *Cf. id.* at 192–93, ¶¶ 35–42 (DCS failing to provide services to a parent suffering from mental illness without being able to show that providing such services would be futile).

¶23 Accordingly, the superior court did not abuse its discretion by relieving DCS from its obligation to provide reunification services because there was reasonable evidence supporting DCS's assertion that services would be futile.

II. REASONABLE EVIDENCE SUPPORTED THE COURT'S FINDING THAT SEVERANCE OF MOTHER'S PARENTAL RIGHTS WAS WARRANTED UNDER A.R.S. § 8-533(B)(3).

¶24 To sever a parent–child relationship, the juvenile court must find by clear and convincing evidence that at least one of the grounds set forth in A.R.S. § 8-533(B) exists, and the court must find by a preponderance

of the evidence that severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41 (2005); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12 (2000). Under A.R.S. § 8-533(B)(3), DCS was required to prove that Mother was "unable to discharge parental responsibilities because of mental illness," that "there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period," and that it made a diligent effort to provide appropriate reunification services. *See Mary Ellen C.*, 193 Ariz. at 192, ¶¶ 33–34.

¶25 As discussed above, the first-appealed court order relieved DCS of its obligation to provide reunification services because it found by clear and convincing evidence that doing so would be futile. *See id.* at 193, ¶ 42 (requiring DCS to make a reasonable effort to provide services or to show that "such efforts would be futile").

¶26 In her second appeal, Mother argues that DCS offered insufficient evidence to support the severance on mental illness grounds. The grounds for severance based on mental illness under § 8-533(B)(3) are similar to the grounds for terminating services based on mental illness under § 8-846(D)(1)(b). Therefore, the evidence that supported the order terminating services also adequately supported the court's findings in its severance order.

¶27 For instance, the evidence showed that Mother's mental illness was the cause of her inability to discharge her parenting responsibilities, as indicated by Dr. Overbeck's 2011 opinion that Mother "exhibits an extremely serious impairment of attachment that has in the past — and continues to the present — to severely impair her ability to safely, consistently and effectively nurture and protect her children." Additionally, Mother's persistent mental health issues, which the evidence shows have been resistant to treatment and have led to multiple severances, gave the court a reasonable basis to believe that her issues would continue into the "prolonged indeterminate" future. And Mother's case manager testified, based on a determination by Dr. Gill, that Mother's psychological evaluations from years prior were adequately reliable and that additional evaluations were unnecessary because there was no reason to believe that Mother's behavior would change.

¶28 We therefore affirm the superior court's finding that severance was warranted under A.R.S. § 8-533(B)(3). And because we find that sufficient evidence supports one ground for severance, we need not consider the other ground under A.R.S. § 8-533(B)(10). *See Mary Lou C.*, 207 Ariz. at 49, ¶ 14.

CONCLUSION

¶29 Because reasonable evidence supported the superior court's orders terminating reunification services and severing Mother's parental relationship with S.W., we affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA