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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KENNETH W., BRANDY B., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY, K.W., J.W., I.W., *Appellees*.

No. 1 CA-JV 17-0385
FILED 3-15-2018

Appeal from the Superior Court in Navajo County
No. S0900JD201500013
The Honorable Michala M. Ruechel, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Jennifer B. Campbell delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Paul J. McMurdie joined.

C A M P B E L L, Judge:

¶1 Brandy B. (“Mother”) and Kenneth W. (“Father”) appeal the juvenile court’s order terminating their parental rights to K.W., J.W., and I.W. (collectively, the “children”). On appeal, both parents challenge the juvenile court’s best interests findings and Mother also challenges the court’s finding of the statutory ground of fifteen months in an out-of-home placement. For the reasons explained, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2011, the children were declared dependent due to allegations that Mother and Father were abusing substances, leaving the children with inappropriate caregivers, and providing an unfit home. The children were returned to the parents in 2012 after they successfully completed reunification services.

¶3 In March 2015, DCS filed a dependency petition and took temporary custody of the children. DCS alleged, and Father later admitted, the children were dependent because of neglect based on substance abuse, his inability to provide the necessities of life, and lack of any legal source of income. DCS also alleged, and Mother later admitted, the children were dependent because of neglect arising from a significant history of substance abuse and her inability to provide the necessities of life for her children.¹ The juvenile court granted the petition and adjudicated the children dependent.

¶4 In March 2015, Mother and Father were arrested in Kingman. At the contested severance hearing, Mother testified she had been sentenced to a term of imprisonment relating to a drug paraphernalia

¹ DCS also filed a dependency petition as to Mother regarding her child A.L., which it later moved to dismiss due to A.L. turning 18 years of age.

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

conviction from 2011, and that Father was also incarcerated for a period of time. Mother testified when she was arrested in Kingman, she and Father were on their way to an inpatient drug rehabilitation facility, the “Dream Center Church” (the “Center”). She explained they intended to give their friends (A.G. and D.G.) guardianship of the children because they were unable to care for the children.

¶5 In May 2016, Mother and Father were again arrested. They were indicted on one count of possession of dangerous drugs for sale (methamphetamine), one count of possession of dangerous drugs (Alprazolam), and one count of possession of drug paraphernalia. Father admitted he violated a previous term of probation imposed by the superior court and pled guilty to attempted transportation of dangerous drugs for sale (methamphetamine). In August 2016, the superior court sentenced Father to concurrent sentences of 3.5 years in the Department of Corrections; he was still incarcerated at the time of the severance hearing and did not testify. At the severance hearing, Mother admitted there was an active bench warrant for her arrest relating to the still pending 2016 matter.

¶6 In January 2017, DCS moved to sever the parents’ parental rights.² That same month, Mother checked herself into inpatient treatment at the Center. A program advocate and a director at the Center both testified at the hearing that Mother was participating in the Center’s programs. Mother admitted she continued to abuse methamphetamines until starting treatment at the Center. She was still in treatment at the time of the hearing.

¶7 Amy Watts, the DCS case manager, testified the children could not be safely returned to Mother or Father, noting Mother was in the inpatient program and Father was incarcerated. She explained that throughout the dependency, Mother and Father would relapse and get arrested, resulting in or continuing unstable housing. She testified that during the course of this dependency, Mother had not been able to produce clean “UAs” for a sustained period of time, or outside of a structured inpatient facility, and did not complete outpatient services. She also opined Mother had not made the required “sustained behavior[al] changes.”

² DCS alleged four statutory grounds of termination: neglect or willful abuse, chronic and prolonged substance abuse, nine months in an out-of-home placement, and fifteen months in an out-of-home placement.

¶8 The juvenile court later issued a detailed ruling. It subsequently signed findings of facts and conclusions of law finding, as to Mother and Father, DCS had proven by clear and convincing evidence three statutory grounds of termination: neglect or willful abuse; nine months in an out-of-home placement; and fifteen months in an out-of-home placement.³ After also finding termination of their parental rights was in the children's best interests, the juvenile court terminated Mother and Father's parental rights.

DISCUSSION

¶9 To terminate a parent's parental rights, the juvenile court must find by clear and convincing evidence at least one of the statutory grounds for termination. *Crystal E. v. Dep't of Child Safety*, 241 Ariz. 576, 577, ¶ 4 (App. 2017). The juvenile court must also find termination is in a child's best interests by a preponderance of the evidence. *Id.* The juvenile court is in the best position to weigh the evidence and judge the credibility of witnesses and, as such, this court does not reweigh the evidence. *Jennifer S. v. Dep't of Child Safety*, 240 Ariz. 282, 286-87, ¶ 16 (App. 2016). We will affirm the juvenile court's termination order if reasonable evidence supports its factual findings. *Id.*

I. Fifteen Months in Out-of-Home Placement

¶10 Only Mother challenges the statutory grounds of termination. When, as here, we affirm on one statutory ground, we need not consider whether the juvenile court's findings justified severance on any other statutory ground found by the court. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251, ¶ 27 (2000).

¶11 Termination of parental rights based on fifteen months in an out-of-home placement requires the juvenile court to find DCS has proven the ground by clear and convincing evidence. Ariz. Rev. Stat. ("A.R.S.") § 8-537(B). Accordingly, the juvenile court must find: first, the child has been in an out-of-home placement for a cumulative total period of fifteen months or longer; second, the parent has been unable to remedy the

³ Regarding the statutory bases of neglect or willful abuse, the juvenile court's findings of fact and conclusions of law appears to conflict with its detailed ruling. This court, however, can affirm on any ground, *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251, ¶ 27 (2000), thus we need not resolve this apparent conflict for resolution of this appeal.

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

circumstances which caused the out-of-home placement; and third, there exists a substantial likelihood the parent will not be capable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c). In this regard, “circumstances” means “those circumstances existing at the time of the severance that prevent a parent from being able to appropriately provide for his or her children.” *Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, 96 n. 14, ¶ 31 (App. 2009) (citations omitted). The juvenile court must additionally find by clear and convincing evidence that DCS made diligent efforts to provide appropriate reunification services. A.R.S. § 8-533(B)(8). Finally, it must consider the availability of reunification services and the parent’s participation in the services. A.R.S. § 8-533(D).

¶12 Here, the juvenile court found that during the dependency DCS provided Mother with various services, including a best interest bonding assessment, individual counseling, parenting services, parenting classes, substance abuse assessment, substance abuse treatment, transportation, urinalysis testing, and supervised visitation. The juvenile court determined that Mother had not been “fully or significantly compliant” with the services, specifically finding Mother had not completed intensive outpatient counseling, routinely missed parenting classes, failed to complete individual counseling in 2015 and 2016, and failed to complete substance abuse treatment in 2015 and 2016. It also found Mother routinely missed visits in 2016, prompting DCS to place a requirement that she “call and confirm” prior to the scheduled visitation. Even after implementation of this requirement, she habitually missed scheduled visitation.

¶13 Mother admits on appeal she did not fully comply with the services DCS provided. She claims, however, this was due to DCS’s “deficient” efforts in providing inpatient services, which made it “impossible for [her] to comply completely” with the other services.⁴ Because Mother admits a lack of compliance, we address only the juvenile court’s findings regarding DCS’s efforts to provide inpatient treatment.

¶14 At the hearing, a parent aide testified that in October 2016 Mother told her she was overwhelmed and wanted to go into rehab. Watts testified DCS attempted to arrange inpatient treatment, but Mother’s

⁴ DCS argues Mother has waived the issue on appeal because she did not challenge the sufficiency of DCS’s services until the severance hearing. We reject this argument and thus address Mother’s argument. *See Shawanee S. v. Ariz. Dep’t of Econ. Sec.*, 234 Ariz. 174, 178, ¶ 14 (App. 2014).

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

avowal to the treatment facility that she was not abusing substances prevented her admittance into the program. Specifically, the facility required Mother “to admit to the facility that she ha[d] a problem” before they would provide inpatient treatment for substance abuse. Watts also testified DCS contacted another facility to get referrals for other inpatient facilities, but was informed Mother would need to be active in intensive outpatient services “to get a referral to one of the other facilities.” The record demonstrates Mother did not, however, complete intensive outpatient services.

¶15 Regarding Mother’s own efforts to obtain inpatient treatment, the juvenile court – which is in the best position to judge the credibility of witnesses, *Jennifer S.*, 240 Ariz. at 286-87, ¶ 16 – found Mother’s testimony not to be credible. As the juvenile court found, Mother provided inconsistent testimony regarding her efforts to get inpatient treatment. For instance, she testified she was on her way to get treatment at the Center when she was arrested in Kingman in 2015. But in explaining why she did not return to seek treatment at the Center until 2017, she testified she only learned of the Center in 2016 while in jail. Mother entered inpatient treatment at the Center in January 2017 simultaneously with the filing of the Petition to Terminate and over 20 months after the children were removed. We agree with the juvenile court’s conclusion that “Mother could have participated in and completed the program much earlier in the dependency.” Accordingly, the juvenile court’s findings are supported by reasonable evidence.

¶16 Mother next argues the juvenile court erred in finding fifteen months in out-of-home placement because DCS failed to prove she “willfully refuse[d] to remedy the circumstances,” again asserting DCS did not offer inpatient treatment. Mother misstates DCS’s burden under this ground. Unlike the ground of nine months, which requires clear and convincing evidence Mother “has *substantially neglected or willfully refused* to remedy the circumstances that cause[d] the child to be in an out-of-home placement,” A.R.S. § 8-533(B)(8)(a) (emphasis added), the ground of fifteen months instead required DCS to prove only that Mother “*has been unable to remedy* the circumstances that cause[d] the child to be in an out-of-home placement,” A.R.S. § 8-533(B)(8)(c) (emphasis added).

¶17 The juvenile court found Mother caused the delay in getting inpatient treatment and failed to obtain or maintain employment, sobriety, and housing, and failed to demonstrate she could care for her children without leaving them in the care of others for “extended” time periods. Mother admitted she used methamphetamine until before she started

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

treatment at the Center in 2017, that she had no form of income, and the children would be unable to live with her until after she completed the program at the Center, which would take more than six months. Mother presents no legal argument, nor any citation to the record, challenging the juvenile court's finding that she was unable to remedy the circumstances within the meaning of A.R.S. § 8-533(B)(8)(c). Accordingly, she has waived any challenge to this finding. See ARCAP 13(a)(7)(A); *Melissa W. v. Dep't of Child Safety*, 238 Ariz. 115, 117–18, ¶ 9 (App. 2015).

II. Best Interests

¶18 Both parents challenge the juvenile court's best interests findings. To find termination is in a child's best interests, the juvenile court must find, by a preponderance of evidence, the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Bennigno R. v. Ariz. Dep't of Econ. Sec.*, 233 Ariz. 345, 350, ¶ 23 (App. 2013) (citation omitted). The juvenile court may consider whether there exists a current plan for the child's adoption and whether the current placement is meeting the child's needs. *Id.* The juvenile court may also consider whether the child is adoptable. *Dominique M. v. Dep't of Child Safety*, 240 Ariz. 96, 98, ¶ 11 (App. 2016). "[I]n most cases, the presence of a statutory ground will have a negative effect on the children." *Bennigno R.*, 233 Ariz. at 350, ¶ 23 (citation omitted).

¶19 Here, the juvenile court made several findings in its detailed ruling, including that, throughout the dependency, Mother and Father continued to use illegal substances, placed the children in the care of others, failed to provide or maintain stable or appropriate housing, and had failed to obtain employment so that they could meet the children's needs. The court explained that "[a]lthough the children do have a bond with the parents, they need consistency, permanency, and stability" including a home in which they would receive an "appropriate education and have their medical needs met" which the court found "an adoption would provide." It also found the children were adoptable and their current placement was meeting all of their needs.

¶20 Mother argues, however, the juvenile court erred because it did not find either an affirmative benefit to the children or a detriment. Instead, she argues "the [c]ourt simply stated that severance would benefit the children by providing 'them with permanency and stability that an adoption would provide.'" Mother also argues the juvenile court failed to give "due weight" to her love for her children. We reject both arguments. The juvenile court's findings demonstrate it found several affirmative

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

benefits, including that the children were adoptable, *see Dominique M.*, 240 Ariz. at 98, ¶ 11, in addition to identifying detriments to the children if Mother's rights were not terminated. While the juvenile court found that the children had a bond with Mother, it also found the bond was not sufficient to overcome the children's other needs that were not being met. Mother is essentially asking this court to reweigh the evidence, which we will not do. *See Bennigno R.*, 233 Ariz. at 351-52, ¶ 31.

¶21 With respect to Father, he asserts "[v]irtually no evidence" supports the court's findings and asks this court to remand the matter for a determination of whether "permanent guardianship is a more appropriate solution." First, although the juvenile court considered a permanent guardianship and concluded it was unlikely to provide the children with permanency and stability, it was not required to consider a permanent guardianship as part of its best interests determination. *See supra* ¶ 18; *see also Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5 (App. 1998) (juvenile court is not required to weigh alternative placement possibilities in its best interests analysis).

¶22 Second, Father relies on the juvenile court's findings in its April 2017 order granting DCS's motion to change physical custody of the children from their placement at L.S. and M.S.'s home to A.G. and D.G.'s home. Father's reliance is misplaced. Father points to the court's finding in the April order that A.G. and D.G.'s "willingness to allow further safe communication with [Mother and Father] when the children get older is in their best interests overall" and argues that "nothing factually had changed" with respect to that finding.⁵ Even assuming this is true, the juvenile court's findings in its April 2017 order have nothing to do with the juvenile court's subsequent determination that termination of Father's parental rights were in the children's best interests. *See Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, 370-71, ¶ 2 (App. 2009). Moreover, Father

⁵ Per the juvenile court's findings, the children were initially placed with their paternal grandmother ("grandmother") at the start of the dependency. Because grandmother was unable to take care of all three children, K.W. remained with grandmother until about October 2015, whereas J.W. and I.W. were placed with A.G. and D.G. until they moved out of state in about July 2015, at which point the children were placed with L.S. and M.S. In October 2015, K.W. was also placed in L.S. and M.S.'s home, where all three children resided together, and in which K.W. expressed a preference to stay. After the termination hearing, K.W. filed a motion to reconsider the juvenile court's April 2017 ruling, which the court denied.

KENNETH W., BRANDY B. v. DCS et al.
Decision of the Court

does not contest the juvenile court's finding that before his incarceration, aside from visitation, Father "did little to address the issues which caused the children to be in an out-of-home placement." Further, DCS case manager Watts testified that severance—not a permanent guardianship—was in the children's best interests. Accordingly, reasonable evidence supports the juvenile court's findings that termination of parents' parental rights was in the children's best interests.

CONCLUSION

¶23 For the foregoing reasons, we affirm.



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