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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALICIA D., THOMAS D., *Appellants,*

v.

DEPARTMENT OF CHILD SAFETY, S.D., E.D., *Appellees.*

No. 1 CA-JV 17-0439
FILED 3-27-2018

Appeal from the Superior Court in Maricopa County
No. JD33645, JS18864
The Honorable Alison Bachus, Judge

AFFIRMED

COUNSEL

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By Robert D. Rosanelli
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MEMORANDUM DECISION

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

B E E N E, Judge:

¶1 Alicia D. (“Mother”) and Thomas D. (“Father”) (collectively, “Parents”) challenge the superior court’s order terminating their parental rights to S.D. (born in 2007) and E.D. (born in 2011) (collectively, “Children”). Because reasonable evidence supports termination, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Parents are divorced and had joint custody of the Children. The Department of Child Safety (“DCS”) first became involved with Parents in 2015 regarding unsubstantiated reports that Father was sexually abusing the Children.

¶3 Then in May 2016, Mother again accused Father of sexually abusing E.D. due to E.D. acting out in sexualized behaviors, but DCS did not substantiate the report. DCS offered Parents several services at that time, but they refused to participate. Mother’s boyfriend, Quinton had previously moved in with Mother and the Children in February 2016. Although DCS did not investigate him in connection with Mother’s 2016 allegation against Father, DCS requested, and Parents agreed, that Quinton would move out of Mother’s home and have no contact with the Children. Mother failed to follow through, however, and Quinton continued to live with her and the Children. DCS took no further action.

¶4 Over time, Mother suspected Quinton was sexually abusing the Children based on their sexualized behaviors and her suspicion grew when, on Saturday December 31, 2016, Mother heard S.D. growl at Quinton. S.D., nine years old at the time, is autistic, low-functioning, non-verbal, and has significant expressive delay. S.D. would growl to express her dislike for someone.

¶5 The following day, Sunday January 1, 2017, Mother created an “opportunity” for Quinton to be alone with the Children for six hours. She placed a voice recorder in their bedroom and left it on while she ran

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errands. Mother listened to the recording upon her return and heard what she suspected to be evidence of Quinton perpetrating a sexual offense against S.D. That night, Mother elicited a confession from Quinton, yet the Children stayed in the home that night with Mother and Quinton. The next day, Monday January 2, while driving to the store with the Children in the car, Mother confronted Quinton again. This time, she recorded the conversation and Quinton confessed a second time to sexually abusing S.D., admitting to molesting her “a few times.”

¶6 Meanwhile, Father returned from an out-of-town business trip late on Monday January 2. That night, Mother notified Father that Quinton had sexually abused S.D. and she had a recording. Father, however, was “too tired to listen to the recording” and said he would listen to it the next day after work. The Children stayed overnight in the house with Mother and Quinton on Monday January 2.

¶7 The next day, Tuesday January 3, Mother took the Children to school. Father went to work, picked the Children up from school, and met with Mother that evening to listen to the recording. Father then conducted online research as to how to handle the situation. The Children stayed at Father’s home Tuesday night, he took them to school the next morning, Wednesday January 4, and Mother picked them up from school and took them to the home they shared with Quinton. When Father finished work, he called the police at approximately 7:00 p.m. and met officers at Mother’s home later that evening. When police arrived at Mother’s house, Quinton was inside the home with Mother and the Children.

¶8 DCS took the Children into custody early on Thursday January 5. DCS filed a dependency petition and a petition to terminate Parents’ parental rights the following month alleging Parents willfully abused or failed to protect the Children from abuse under Arizona Revised Statutes (“A.R.S.”) section 8-533(B)(2). Parents subsequently obtained orders of protection against Quinton.

¶9 In August 2017, the superior court held a joint dependency and termination hearing and terminated Parents’ parental rights to the Children on the ground alleged in the petition and found that severance

would be in the Children's best interests.¹ Father and Mother each filed a timely notice of appeal.² We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 8-235(A), 12-120.21(A)(1), and -2101(A)(1).

DISCUSSION

¶10 The right to parent one's child is fundamental but not absolute. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). The superior court may terminate parental rights if it finds, "by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533," and by a preponderance of the evidence that termination is in the best interests of the child. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12 (2000); *Kent K.*, 210 Ariz. at 284, ¶ 24.

¶11 "[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the court's decision," *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18 (App. 2009), and we will not reverse unless "there is no reasonable evidence to support" the order, *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, observe the parties, judge the credibility of the witnesses, and make appropriate findings," we will accept its findings of fact unless no reasonable evidence supports them. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

¶12 We find that reasonable evidence supports the superior court's determination that severance of Parents' parental rights to the Children was warranted under § 8-533(B)(2).

¹ The superior court found the Children to be dependent as to Parents in the same ruling it terminated Parents' parental rights. Neither parent challenges that ruling in this appeal.

² Mother and Father appealed separately, and DCS moved for leave to file a consolidated answering brief. We granted DCS's motion and accordingly consider both appeals together.

I. Father – Sufficiency of Evidence

¶13 Father argues that insufficient evidence exists to support the superior court’s finding that he failed to protect the Children from abuse.³ Specifically, Father argues the court held him “strictly liable” for the abuse suffered by S.D. when his conduct did not place the Children at risk of harm, he did not act in an irresponsible manner, and there is no evidence he is an unfit parent. We disagree.

¶14 As a threshold matter, despite Father’s contention, the court did not apply a strictly-liable standard of proof. The court, in its ruling, parsed through the sequence of events pertinent to the case and found Father “failed to protect his children from abuse.”

¶15 A parent’s rights to his child may be terminated when “the parent has neglected or wilfully abused a child . . . includ[ing] serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.” A.R.S. § 8-533(B)(2). Parents who allow another person to abuse their children “can have their parental rights to their other children terminated even though there is no evidence that the other children were abused[.]” *Tina T. v. Dep’t of Child Safety*, 236 Ariz. 295, 299, ¶ 17 (App. 2014).

¶16 Although Parents’ testimony regarding the days leading up to Father calling the police is not entirely harmonious, the superior court specifically found the following:

1. Upon Father’s return late on Monday January 2, Mother notified him that she suspected Quinton sexually abused S.D. and was in possession of taped evidence of the abuse as well as a confession;
2. Father, however, told Mother he “was too tired” to listen to the recording or address the matter further, and instead “went to bed in his home while his children slept in the home of [S.D.’s] abuser;”

³ Mother does not challenge the superior court’s termination of her parental rights on the ground that she failed to protect the Children from abuse; thus, we do not address it. *See Crystal E. v. Dep’t of Child Safety*, 241 Ariz. 576, 577-78, ¶ 5 (App. 2017).

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3. Father went to work the next morning, Tuesday January 3, instead of taking steps to protect the Children, despite knowing they spent the previous night at Mother's house with S.D.'s abuser;
4. The evening of Tuesday January 3, after learning that Quinton confessed to sexually abusing S.D., Father chose to conduct online research instead of calling the police;
5. After having the Children spend the night at his house on Tuesday, Father went to work on Wednesday January 4, allowing the Children to return home to Quinton after school; and
6. "Father presented on the stand with a somewhat flat affect, and documentary evidence shows others have made similar observations."

¶17 Reasonable evidence supports the superior court's findings. The investigative detective spoke with Mother on January 4 and 5. Mother told the detective she notified Father on January 2 regarding Quinton's abuse of S.D. and that she had a recording of the incident and Quinton's subsequent confessions. But Father was arriving back from a business trip and told Mother he was "too tired to listen to the recording, but that he would listen to it the next day after work." DCS case worker's interview with Mother on January 4 shortly after removing the Children mirrored what Mother told the detective. Most importantly, when the case worker interviewed Father on January 4, he said that when he arrived late on Monday January 2, Mother told him she had recorded evidence of Quinton's sexual abuse of S.D., but Father responded that he was tired and did not listen to the tape that night. Father said he went to work on Tuesday January 3, listened to the tape after work, and had the Children stay overnight. Father stated he took the Children to school on Wednesday, agreeing that Mother would pick them up and bring them home, despite knowing Quinton would be there. Father said he felt the Children would be protected because Mother was there.

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¶18 At the termination hearing, Father testified he took Mother at her word that Quinton sexually abused S.D. and yet he waited to call the police until two days later and obtained an order of protection the day after that. In fact, Father said that he allowed the Children to return to Mother's supervision and the home in which Quinton still lived on Wednesday January 4, knowing Mother created the risk to the Children, because they "would only be around [Quinton] maybe 2 hours."

¶19 The evidence showed that Quinton sexually abused S.D. on Sunday and confessed to doing so on both Sunday and Monday; Father was advised Quinton abused S.D., and confessed on tape, on Monday; Father let the Children stay overnight with Quinton on Monday; Father let the Children return to Quinton on Wednesday after school; and Father did not call the police until Wednesday night, two days after learning of the abuse. Quinton was arrested on the night of Wednesday January 4 for sexually abusing Father's nine-year-old, non-verbal, special needs child. Inexplicably, when DCS returned to interview Parents on Thursday January 5, mere hours after Quinton was arrested and DCS removed the Children, Mother, Father, Quinton, and Quinton's mother were at the house. DCS noted that Father "seemed to be indifferent and showed no emotion regarding his daughter [being] sexually abused, and was in the home with [Quinton] when DCS arrived."

¶20 Contrary to Father's contention that he did not place the Children at risk, the superior court found, and the evidence showed, that "Father's lack of protective measures for his children [was] extremely disconcerting." After weighing the evidence, observing the parties, and judging the credibility of witnesses, the court found Father's actions constituted failure to protect the Children and clear and convincing evidence supported termination. *See Jesus M.*, 203 Ariz. at 280, ¶ 4. We find that, based upon our review of the record, reasonable evidence supports the court's findings and therefore affirm. *See Mary Lou C.*, 207 Ariz. at 47, ¶ 8. Our role is not to reweigh the evidence. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 81, ¶ 13 (App. 2005). Therefore, the fact that we might have reached a different conclusion on the same record is not grounds for reversal.

II. Mother – Best Interests

¶21 Mother argues that insufficient evidence exists to support the superior court’s finding that termination of her parental rights is in the Children’s best interests.⁴ Specifically, Mother contends she “demonstrated repeatedly” she sought to protect the Children “at all costs . . . was willing to involve the Department of Child Safety, law enforcement, and even her ex-husband . . . was also willing to open herself up to tremendous scrutiny, to make bold allegations against her boyfriend, and to put her children before her romantic interests.” We disagree.

¶22 “Best interests” is a technical term that does not always carry its broad colloquial meaning. It is unconstitutional “to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.” *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Indeed, “[t]he State’s interest in finding the child an alternative permanent home arises only when it is *clear* that the natural parent cannot or will not provide a normal family home for the child.” *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (internal quotation and citation omitted).

¶23 While the severance-ground inquiry focuses on the parent, the best-interests inquiry primarily focuses on the child. See *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 15 (2016); *Kent K.*, 210 Ariz. at 287, ¶ 38. Best interests is a fact-specific, case-by-case determination in which the court balances a parent’s interest in maintaining a relationship with his or her child (diluted by the existence of a severance ground) against the child’s interest in a safe and stable home life. *Demetrius L.*, 239 Ariz. at 4, ¶ 15; *Kent K.*, 210 Ariz. at 286, ¶ 35. Though severance grounds usually have a negative impact on the child, the existence of a ground is not itself a basis for an adverse best-interests finding—something more is required. See *Maricopa Cty. Juvenile Action No. JS-500274*, 167 Ariz. 1, 5 (1990). Severance must affirmatively benefit the child or eliminate a detriment of the parental relationship. *Dominique M. v. Dep’t of Child Safety*, 240 Ariz. 96, 98, ¶ 8 (App. 2016).

¶24 We disagree with Mother’s argument that this case “bears striking similarities” to the facts of *Alma S. v. Dep’t of Child Safety*, 1 CA-JV

⁴ Father does not challenge the superior court’s finding that termination of his parental rights is in the Children’s best interests; thus, we do not address it. See *Crystal E. v. Dep’t of Child Safety*, 241 Ariz. 576, 577-78, ¶ 5 (App. 2017).

16-0497, 2017 WL 5413119, at * 1, ¶ 1 (Ariz. App. Nov. 14, 2017) (mem. decision). Unlike Mother in this case, the mother in *Alma S.* did not knowingly create the opportunity for her child to be abused, and unlike Mother in this case, that mother wanted to take her child to the hospital but was forbidden to do so by the child's abusive father. *Id.* at * 1, ¶ 3. The mother in *Alma S.* quickly engineered a ruse, at her own peril, to enable family members to take the child to the hospital on her behalf. *Id.*

¶25 Here, the evidence shows that Mother deliberately failed to protect S.D. from abuse. She did not, as she asserts, repeatedly demonstrate that she sought to protect the Children at all costs. In fact, when she became suspicious of Quinton and his behavior towards her Children, she did not call the police, ask him to move out, or get an order of protection against him. Instead she created the opportunity for him to further sexually abuse her Children. When she had evidence of Quinton's sexual abuse of S.D. on audio tape, she obtained an admission from him, and then confirmed his confession in a second audio recording. Again, Mother did not report Quinton to DCS or the police, but only to Father who reported him to the police four days after the abuse took place.

¶26 The superior court found, by a preponderance of the evidence, that severance was in the Children's best interests. The court found that a current proceeding was pending for the Children to be placed with their grandparents in Georgia; current placement was meeting the Children's needs in the interim, including their special needs; the Children are adoptable; and severance will benefit the Children because they need a safe home free from abuse and Mother has demonstrated she cannot or will not protect them. Because reasonable evidence supports the court's findings that termination was in the Children's best interests, we affirm. *See Mary Lou C.*, 207 Ariz. at 47, ¶ 8.

CONCLUSION

¶27 For the foregoing reasons, we affirm the superior court's order terminating Parents' parental rights to their Children.

T H O M P S O N, Judge: concurring in part, dissenting in part.

¶28 From the time of Father's return from his business trip until Quinton's arrest, the children were not left alone with the perpetrator, and were not further harmed. There is no evidence at all that Father contributed in any way to the harm perpetrated by Quinton. Indeed, Father saw to it

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that Quinton was removed from his children's home by arresting police officers. On this record, I cannot conclude that clear and convincing evidence supports a finding of a statutory ground for severance as to Father for failing to protect his children. Therefore, I would reverse as to Father. I agree that the evidence supports severance as to Mother.



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