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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NEIL H., MICHELLE H., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY, M.R., JESSE T., LIZETH R., *Appellees*.

No. 1 CA-JV 18-0059
FILED 9-27-18
AMENDED PER ORDER FILED 9-27-18

Appeal from the Superior Court in Maricopa County
No. JD 527899
No. JS 518344

The Honorable Colleen L. French, Judge Pro Tem

AFFIRMED

COUNSEL

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By Amanda Adams
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By David C. Lieb
Counsel for Appellee Lizeth R.

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Neil H. and Michelle H. (collectively "foster parents") were the foster parents of MR. They appeal the juvenile court's decision denying their motion to sever the parental rights of Jesse T. ("father") and Lizeth R. ("mother"). For the following reasons we affirm the juvenile court's decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 MR was placed in foster parents' care in August 2014 when she was three months old and had been in their care for over 36 months at the time of the hearing. She was initially removed from mother and father's home when it was alleged that father had hit mother's three children from a previous relationship with a sandal. Father ultimately pled guilty to child abuse for those claims and received three years' probation.

¶3 Mother and father participated in services provided by DCS over the next several years. However, their progress was slow and in April 2016 the Department of Child Safety ("DCS") filed a motion to terminate their parental rights on the fifteen-months out-of-home placement ground. DCS withdrew that motion in November 2016 because father began showing signs of progress with his case-plan goals.

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¶4 In September 2016 the foster parents filed a motion to intervene in the dependency case, and asked the court to move forward with the severance and adoption proceedings. Foster parents alleged that MR had told them mother was hurting her and that they were concerned for her welfare and safety.

¶5 In January 2017 foster parents filed a petition to terminate mother and father's parental rights to MR on the out-of-home placement ground and the mental illness ground to father only. Mother and father denied the allegations in the petition, and the juvenile court consolidated the dependency and severance matters. The guardian ad litem then requested that MR participate in a best interests' assessment with mother, father, and the foster parents, which the juvenile court granted.

¶6 The best interest assessment was completed by Dr. Robert H. Mastikian and he opined that MR and father had a "healthy and strong bond" and recommended that DCS place MR with Father. Dr. Mastikian also opined that the foster father had improper boundaries with MR and recommended that he participate in a psychosexual evaluation.

¶7 In May 2017, DCS filed a motion requesting that MR be placed in father's physical custody. The juvenile court denied DCS's motion but did change the case plan to family reunification and ordered that DCS increase mother and father's unsupervised visits. Following that ruling foster parents made numerous reports to the DCS hotline and the Mesa Police Department regarding bruises on MR and claims MR had made regarding father hitting her and putting her in a cage. All reports of abuse were found to be unsubstantiated by both DCS and the police.

¶8 In December 2017 foster parents filed a motion requesting that mother and father's visits be supervised. Father objected and requested that the juvenile court return MR to his physical custody pursuant to Rule 59. The juvenile court denied foster parents' motion and held a hearing for father's motion. The court determined that the matter should be held "in abeyance until after the contested severance hearing," which was held the following month.

¶9 Following the contested termination hearing, the juvenile court found that foster parents did not prove the statutory grounds alleged, and granted father's Rule 59 motion. The court found that mother and father had participated in services and had remedied the circumstances that caused MR to be placed in care, and were "capable of exercising proper and effective parental control." Foster parents timely appealed. We have

jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 8-235(A) (2018), 12-120.21(A)(1) (2018), and 12-2101(B) (2018).

DISCUSSION

¶10 A parent’s right to custody and control of his own child, while fundamental, is not absolute. *Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, 248 ¶¶ 11-12 (2000). Severance of a parental relationship may be warranted where a party proves one of A.R.S. § 8-533’s statutory grounds for termination by “clear and convincing evidence.” *Id.* at 249, ¶ 12; A.R.S. § 8-863 (B) (2018)

¶11 “[W]e will 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 (App. 2002). We do not reweigh the evidence, but “look only to determine if there is evidence to sustain the court’s ruling.” *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004).

¶12 Appellants argue on appeal that the juvenile court ignored “uncontroverted evidence on the central issue.” Specifically, appellants argue that there was no evidence presented to contradict the claims that MR had told numerous people that her biological parents were beating her. The record does not support this argument.

¶13 The DCS case manager testified that DCS opened multiple investigations into the allegations of abuse and determined each time that no abuse occurred. Additionally, the Mesa police department conducted four investigations and determined each time that there was no evidence to substantiate the claims of abuse. Furthermore, MR regularly changed her story about how her injuries occurred depending on who was asking.

¶14 The court found that MR’s out of court statements were unreliable because of the timing, the manner in which the statements were elicited, and MR’s young age. Because the record supports the juvenile court’s finding we affirm the ruling.

¶15 Appellants also argue that there was no “substantial likelihood that the biological parents would be capable of exercising proper and effective care.” Appellants’ main argument is that “a parent who continues to beat a child . . . cannot exercise proper and effective parental care.” This argument is not supported by the record. Not only were the claims of abuse repeatedly found after investigation to be unsubstantiated,

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but multiple parties testified to the father's ability to parent MR. Father's therapist Dr. Loeb testified that father had completed therapy as required by DCS and continued to attend therapy in order to have the additional support it provided. Dr. Loeb also testified that he believed father was capable of parenting MR and did not have any concerns about returning her to his care. Additionally, the DCS case manager testified that father had completed all services required of him and was capable of exercising proper and effective care of MR. Because the record supports the juvenile court's finding, we affirm the ruling.

¶16 Appellants next argue that the court committed reversible error by "excluding evidence" that DCS ignored 42 U.S.C. § 675(5)(E) (2018). That statute states in pertinent part:

In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the child's parents . . . unless . . . a State agency has documented . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child.

The record does not reflect that appellants ever attempted to argue or offer evidence that DCS had failed to comply with the statute. Instead, appellants on appeal cite to the record where their witness Dr. Ronald J. Lavit, a clinical psychologist, opined about the potential dangers of returning a child to biological parents after spending 15 months or longer with a foster family. We presume the court considered the testimony and did not find it dispositive as to whether MR should be returned to the care of mother and father.

¶17 Furthermore, the record shows that DCS did comply with the federal statute, and filed a timely motion to sever. DCS's case record, which documents its management of the case, appropriately documents that severance and adoption was not, at that time, the optimal plan for MR.¹ Because the record supports the juvenile court's holding, we affirm.

¹ Of course, there was, in fact, a subsequent termination proceeding initiated by foster parents. Without saying so, it appears that appellants are upset that, in the end, DCS was not the initiating advocate for termination of parental rights. Nevertheless, a full evidentiary hearing was held, and

¶18 Appellants next argue that the juvenile court committed reversible error when it “excluded” and “refused to listen to” evidence of DCS’s alleged motives for not moving to sever parents’ rights. During the hearing appellants offered as evidence a letter Foster Father wrote to the governor of Arizona. DCS objected on relevance grounds and the court sustained that objection ruling that appellants had the burden of proving their grounds for termination and best interest of the child and the letter was not relevant to those issues. Additionally, appellants admit that at least one of their exhibits showing DCS’s hostility towards the foster parents was admitted into evidence. Decisions about admissibility of evidence, and whether exhibits are cumulative, are left to the sound discretion of the juvenile court. Further, foster parents testified at length concerning the communications and relationship with DCS. We do not see in this record any abuse of that discretion. We further presume the judge considered the evidence of purported bias and did not find it dispositive; as such, we affirm the ruling.

¶19 Appellants also argue that the juvenile court erred by not drawing a negative inference when mother and father chose not to testify. We first note that foster parents didn’t ask the juvenile court to draw a negative inference from the lack of testimony by either parent. However, even if they had the judge was not required to do so. In *Melissa W. v. Department of Child Safety*, 238 Ariz. 115, 117, ¶ 5 (App. 2015), this court held that it was not error to draw a negative inference based on a parent’s failure to testify. It did not however require that a juvenile court do so, it is within the discretion of the trial court whether or not to draw a negative inference. *Id.* Furthermore, the evidence of abuse was controverted through reports that found the allegations of abuse to be unsubstantiated. We assume the juvenile court determined those to be more convincing than the parent’s decision to not testify.

¶20 Finally, appellants raise two additional issues: (1) whether “controversy over one or two of the 19 items of evidence” created a factual dispute; (2) the effect of a “failed attack” by parents and DCS on foster Father. In the end, all three of these issues are really nothing more than a reiteration that this court should reweigh the evidence, which we will not do. The record supports the juvenile court’s finding and therefore the court did not abuse its discretion.

the juvenile court was in the best position to determine credibility of the parties and to resolve the issue.

CONCLUSION

¶21 For the foregoing reasons we affirm the juvenile court's decision.



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