IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

QUENACIA F., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, J.R., N.R., P.R., J.R., *Appellees*.

No. 1 CA-JV 18-0070
FILED 7-31-2018

Appeal from the Superior Court in Maricopa County
No. JD33749
The Honorable Karen Mullins, Judge

AFFIRMED

COUNSEL

John L. Popilek P.C., Scottsdale
By John L. Popilek
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Dawn Rachelle Williams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

J O N E S, Judge:

¶1 Quenacia F. (Mother) appeals the termination of her parental rights to J.R., N.R., P.R., and J.R. (the Children). Mother argues the Department of Child Safety (DCS) failed to make diligent efforts to provide appropriate reunification services and also failed to prove the grounds for severance by clear and convincing evidence.[1] For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In January 2017, Mother took the Children, then ages five, three, one, and seven months, to the hospital after suspecting they had been sexually abused while in the care of their paternal grandmother (Grandmother) and her boyfriend.[2] DCS took custody of the Children at the hospital after learning that Mother had performed physical examinations of the Children and claimed to have uncovered signs of trauma associated with sexual abuse but still waited three days before taking them to the hospital.

¶3 In May 2017, the juvenile court found the Children dependent and set the case plan for family reunification with a concurrent case plan for severance and adoption. DCS offered Mother services designed to reunify her with the Children and eliminate the need for continued out-of-home placement, including: individual counseling, supervised visitation,

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[1] Mother does not appeal the juvenile court's determination that severance is in the Children's best interests, and our review of that issue has been waived.

[2] We view the facts in the light most favorable to upholding the termination order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2 (App. 2008) (citing *Maricopa Cty. Juv. Action No. JS-8490*, 179 Ariz. 102, 106 (1994)).

bus passes to transport her to and from reunification services, a psychological evaluation, parenting classes, and a hair follicle drug test.

¶4 The following month, DCS reported that Mother had shown "a disinterest towards services being offered" and "had minimal contact with the department." Mother was aware that participation in these services was required for reunification. Nevertheless, at the time of the dependency hearing, Mother had attended only seven of the seventeen scheduled visits. Mother, who had complained of transportation issues, received bus passes in order to attend services on two separate occasions, but did not return any used passes to receive new ones. She scheduled two psychological evaluations, failed to appear at one, and canceled the other. DCS attempted to schedule a time with Mother to help her arrange individual counseling but was unsuccessful. Additionally, hair follicle tests were offered and scheduled each month between January and May 2017, but Mother did not participate.

¶5 In July, the juvenile court suspended visitation between Mother and the Children because the Children's placements had reported the older children did not want to attend the visits because they feared Mother. When the Children did attend visitation, they had night terrors, would self-harm, and were afraid that Mother was going to take them away. The Children also reported that Mother had told them that if they did not attend the visits, a demon called "Thunderman" would take them away or kill them. The older children, after some protest, began attending visits in late May, saying they only attended to check on the younger children. This continued until the court suspended visitation in July, pending the implementation of therapeutic visitation.

¶6 In August 2017, DCS recommended Mother participate in the same services, plus therapeutic visitation and substance abuse testing and treatment. DCS recommended drug testing because Father had admitted to using marijuana. Mother still did not complete a hair follicle test in July. She completed only three of eight urinalysis tests scheduled in July and August 2017. Mother missed two more appointments for a psychological evaluation, and a sixth appointment was scheduled for September. She completed an intake for substance abuse treatment in July 2017 but then failed to participate. Mother attended parenting classes on two occasions that month but only participated in three hours of class total. Despite Mother's lack of participation, DCS recommended Mother be given more time to pursue reunification.

¶7 In November 2017, ten months after the Children had been removed from Mother's care, DCS reported: "[Mother has] failed to consistently engage in services and ha[s] not demonstrated any positive behavioral changes at this time. Reunification services should not be continued." Mother failed to turn in any used bus passes for new ones, failed to participate in hair follicle drug testing, and failed to submit any urinalysis test since late July. Mother missed her September appointment for a psychological evaluation but was finally seen in October. The psychologist's report noted that Mother did not exhibit independent functioning, and also showed signs of mood instability. The psychologist also found Mother had a past history of substance abuse and prominent relationship issues, and that, even with treatment, Mother's ability to parent might not improve. The psychologist recommended that Mother complete the DCS case plan. Therapeutic visitation began in November 2017, and Mother attended three of the four visits. In January 2018, almost one year after the service was first offered, Mother finally completed a hair follicle test, which returned positive for methamphetamine.

¶8 At the contested severance hearing in February 2018, a DCS caseworker testified that Mother had abused the Children, neglected their medical needs, and failed to participate in services. The caseworker further testified that adoption was in the best interests of the Children and would provide them with a chance to break the cycle of abuse. He added that the Children had improved dramatically since being removed from Mother's care and they had assimilated well into their placement families. The juvenile court terminated Mother's parental rights, finding DCS had proved the statutory grounds of abuse, neglect, and time in out-of-home care by clear and convincing evidence, *see* Ariz. Rev. Stat. (A.R.S.) §§ 8-533(B)(2), (8)(a)-(b),[3] and that termination was in the Children's best interests by a preponderance of the evidence. Mother timely appealed, and we have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), -2101(A)(1), and Arizona Rule of Procedure for the Juvenile Court 103(A).

[3] Absent material changes from the relevant date, we cite a statute's current version.

DISCUSSION

I. Mother Waived Her Opportunity to Object to the Diligence of DCS's Reunification Efforts.

¶9 Mother first argues that DCS failed to make diligent efforts to provide appropriate reunification services. To warrant termination of Mother's parental rights, DCS must prove it made diligent efforts to provide her appropriate reunification services. *Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 177, ¶ 12 (App. 2014) (citing A.R.S. § 8-533(B)(8), and *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶¶ 32-34 (App. 1999)). Generally, we defer to the juvenile court's finding of diligence so long as it is supported by substantial evidence. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 81-82, ¶ 13 (App. 2005) (citations omitted). But, where "[DCS] has been ordered to provide specific services in furtherance of the case plan, and the court finds that [DCS] has made reasonable efforts to provide such services . . . a parent who does not object in the juvenile court is precluded from challenging that finding on appeal." *Shawanee S.*, 234 Ariz. at 179, ¶ 16 (citing *State v. Georgeoff*, 163 Ariz. 434, 437 (1990), and *In re Eddie O.*, 227 Ariz. 99, 103 n.2, ¶ 14 (App. 2011)). The rationale for this rule is sound:

> It serves no one to wait to bring such concerns to light for the first time on appeal, when months have passed since the severance order was entered. Instead, a parent's failure to assert legitimate complaints in the juvenile court about the adequacy of services needlessly injects uncertainty and potential delay into the proceedings, when important rights and interests are at stake and timeliness is critical.

Id. at 178-79, ¶ 16; *see also Trantor v. Frederickson*, 179 Ariz. 299, 300 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal" because "a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects.") (citing *Van Dever v. Sears, Roebuck & Co.*, 129 Ariz. 150, 151-52 (1981), and *United States v. Globe Corp.*, 113 Ariz. 44, 51 (1976)). Such an objection may be raised during any number of proceedings before the juvenile court, including at a dependency hearing, periodic review hearings, the permanency planning hearing, and even the termination hearing. *Shawanee S.*, 234 Ariz. at 178, ¶ 14.

¶10 Here, Mother argues DCS failed to provide her adequate reunification services by not offering a psychiatric examination.[4] However, Mother never challenged the adequacy of the services provided by DCS. Moreover, during the severance hearing Mother was asked whether she felt "that there was any service that you needed that wasn't offered to you," to which she responded, "No." Although Mother argues in her reply brief that the responsibility to object to the sufficiency of the services offered by DCS should not be left to unsophisticated parents, Mother was represented by counsel throughout the proceedings. Additionally, a parent's failure to object constitutes waiver regardless of whether she is represented by counsel. *Cf. State v. Cornell*, 179 Ariz. 314, 328 (1994) (citing *State v. Cook*, 170 Ariz. 40, 50 (1991), and *State v. Scott*, 108 Ariz. 202, 203 (1972)).

¶11 On this record, Mother waived her opportunity to challenge the diligence of DCS's reunification efforts by failing to raise the issue in prior proceedings despite ample opportunity to do so. We find no error.

II. DCS Proved the Statutory Grounds for Severance by Clear and Convincing Evidence.

¶12 Next, Mother argues that DCS failed to prove the grounds for severance by clear and convincing evidence. To terminate parental rights, the juvenile court must find by clear and convincing evidence at least one statutory ground for severance. *See Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41 (2005). We do not reweigh the evidence on appeal; as the trier of fact, the court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004) (*citing Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002)). We will affirm a termination order "unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing." *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 94, ¶ 7 (App. 2009)).

¶13 A parent's rights may be terminated pursuant to A.R.S. § 8-533(B)(8)(a) when:

> [T]he child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a

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[4] Mother also argued she could not participate in services because she lacked transportation. She later conceded, however, that DCS offered her both bus passes and taxi transportation and failed to explain how these efforts were insufficient to meet her needs.

> licensed child welfare agency, . . . the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and . . . [t]he child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to [A.R.S.] § 8-806 and the parent has substantially neglected or wil[l]fully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

In evaluating the parent's performance, the juvenile court must consider "the availability of reunification services to the parent and the participation of the parent in these services." A.R.S. § 8-533(D).

¶14 Severance based upon a child's time in an out-of-home placement "is not limited to those who have completely neglected or willfully refused to remedy such circumstances." *Maricopa Cty. Juv. Action No. JS-501568*, 177 Ariz. 571, 576 (App. 1994). Rather, the court is "well within its discretion in finding substantial neglect and terminating parental rights" where a parent makes only "sporadic, aborted attempts to remedy" the situation. *Id.* And even where a parent eventually engages in services and exhibits improvement, those efforts may be "too little, too late." *Id.* at 577 ("Leaving the window of opportunity for remediation open indefinitely is not necessary, nor . . . [is it] in the child's or the parent's best interests.") (citing *Maricopa Cty. Juv. Action No. JS-4283*, 133 Ariz. 598, 601 (App. 1982)). This scheme furthers a young child's interest in permanency by giving the parent an incentive to address her deficiencies and assume her parental responsibilities as soon as possible. *See id.*

¶15 Here, substantial evidence supports the juvenile court's conclusion that severance was warranted because Mother substantially neglected and willfully refused to participate in the offered services. Mother did not participate in any hair follicle tests until January 2018, when she tested positive for methamphetamine. She waited seven months before receiving a psychological evaluation in October 2017, wherein the psychologist gave her a poor prognosis for being able to improve, and then recommended she complete the DCS services. She missed ten of the seventeen visits with the Children in March and April 2017 and visits were suspended in July because the Children feared Mother. Therapeutic visitation began again, four months later, and Mother attended three of the four visits. On a few occasions, Mother participated in urinalysis testing and parenting classes. However, these efforts were "too little, too late," *see JS-501568*, 177 Ariz. at 577, and were not sufficient to overcome Mother's

broad failures to participate in the required services; nor did they justify "[l]eaving the window of opportunity for remediation open indefinitely." *Id.* at 577. In her closing statement, Mother argued that she should be given fifteen months to participate in services. However, because of Mother's substantial failure to participate in DCS services, the juvenile court was not required to wait fifteen months to determine Mother was "unable to remedy the circumstances" when after nine months she "substantially neglected or wil[l]fully refused to remedy the circumstances that cause the child to be in an out-of-home placement." *See* A.R.S. §§ 8-533(B)(8)(a).

¶16 At severance, the Children had been in out-of-home placements for approximately twelve months. During that time, Mother substantially neglected to, and in some instances, willfully refused to participate in the services necessary to remedy the circumstances that caused the Children to be placed outside the home.[5] Accordingly, we find no error.

CONCLUSION

¶17 The order terminating Mother's parental rights to the Children is affirmed.

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

[5] Because we find clear and convincing evidence supports the termination order based upon the time the Children were in out-of-home care, we need not and do not consider whether the remaining grounds are supported by the record. *Jesus M.*, 203 Ariz. at 280, ¶ 3 ("If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.") (citing *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251, ¶ 27 (2000), and *Maricopa Cty. Juv. Action No. JS-6520*, 157 Ariz. 238, 242 (App. 1988)).