IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

RALPH B., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, E.H., *Appellees*.

No. 1 CA-JV 18-0190
FILED 11-29-2018

Appeal from the Superior Court in Maricopa County
No. JD38129
The Honorable Joseph C. Welty, Judge

AFFIRMED

COUNSEL

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Amanda Adams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

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

P E R K I N S, Judge:

¶1 Ralph B. ("Father") appeals the juvenile court's termination of his parental rights to his daughter E.H. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 E.H. was born in August 2014. On October 26, 2015, the Department of Child Safety ("DCS") filed for an in-home dependency for E.H. and her half-brother, who were in the care of their biological mother. Neither the half-brother nor the mother is subject to this appeal. Prior to the dependency, the biological mother kept Father from seeing E.H. on a regular basis; Father first met E.H. when she was already nine months old. Father was initially unaware of the on-going dependency but contested the dependency when he learned of it from E.H.'s mother.

¶3 In March 2016, the juvenile court removed E.H. from her mother's home after her mother allegedly choked her half-brother; DCS placed both children with a maternal relative. The court then adopted a concurrent case plan of reunification and termination. The court also ordered Father undergo a psychological evaluation, and DCS refer Father to a parent aide. In July 2016, the court affirmed only the case plan of reunification for E.H. and again ordered Father to undergo a psychological evaluation.

¶4 Dr. Al Silberman, a psychologist, performed a psychological evaluation of Father on September 14, 2016. In his report, Silberman diagnosed Father with "bipolar II disorder[,] an antisocial personality disorder[, and c]annabis use disorder," but noted that Father reported he had a medical marijuana card. *See* Ariz. Rev. Stat. ("A.R.S.") § 36-2811. When Father reported he had previously been diagnosed with multiple personality disorder, Dr. Silberman concluded that "[h]e does not really have multiple personalities. What he has is a problem with anger." Dr. Silberman wrote that he was "[c]autious" that Father would be able to demonstrate adequate parenting skills, later testifying that he "didn't put

down poor because a lot of it would be followed through with the DCS requirements. . . . Again, [Father] was motivated but whether he could actually follow through is the question."

¶5 Shortly after this evaluation, Father "blew up" at his counselor and stopped attending counseling even with a new counselor. The behavioral services center referred Father to another counseling center in November, as the first center continued attempting to schedule appointments with him. Also in November, DCS inspected Father's home and determined that it was not safe for a young child. Father and his case manager tried to schedule a date for DCS to come back and re-inspect the home after the holidays.

¶6 In February 2017, communication broke down between DCS and Father. At a report and review hearing, the juvenile court ordered the parties to conduct all further communication by email. The next day, DCS emailed Father seeking to schedule a second safety inspection of Father's home to clear it for home visitations. Instead of scheduling the appointment, Father called his DCS caseworker and left a voicemail in which he demanded to speak to her supervisor over the phone. The caseworker replied to Father via email that DCS canceled his visitation referral after he missed three straight appointments on short notice but added that she had again referred him for supervised visits. The caseworker also informed her supervisor of the situation and provided Father with her supervisor's phone number.

¶7 After this, the new case aide emailed Father at least six times in an attempt to schedule visitation between Father and E.H. Father responded over a week later, informing the case aide that he would not visit with E.H. or have any other contact with DCS until he spoke over the phone with the DCS supervisor. Father sent a similar email to his caseworker, who then informed him that DCS was canceling his referral for supervised visits as he had refused to visit E.H. On March 8, DCS placed E.H. and her half-brother with a licensed foster placement as the kinship placement was no longer able to care for them.

¶8 Between February and June 2017, Father had no contact with DCS, had no contact with E.H., and did not participate in any services. In April 2017, Father underwent an intake at TERROS but, due to a lapse in his insurance coverage, he did not start counseling there until June. Despite DCS trying to work on the above issues with Father's counsel, Father filed a motion to compel visitation on May 17, 2017. After hearing argument on the matter, the court ordered Father provide DCS with his scheduling

information. The juvenile court then changed the case plan to termination and adoption in August.

¶9 Dr. George Bluth, a clinical psychologist, conducted a bonding assessment of Father and E.H. on September 12, 2017. E.H. burst into tears immediately upon seeing Father, eventually needing the foster mother to come in and calm her down. After calming down, E.H. still showed little interest in Father, leading Bluth to conclude that E.H. "has minimal attachment with her [F]ather or an avoidant attachment with him." Despite this, Father declined to engage in attachment therapy.

¶10 On September 12, 2017, DCS moved to terminate Father's parental rights as to E.H. on the grounds of 15 months' time in care and that Father was unable to discharge his parental responsibilities due to mental illness. The juvenile court then ordered DCS inspect Father's home for in-home visitation. DCS conducted the inspection on January 10, 2018, and approved in-home visitation about two weeks later. Father continued to request visitation at a DCS center, and continued to be inconsistent in his visitation schedule, often canceling sessions and ending others early.

¶11 The juvenile court held a termination hearing on January 25 and 26, and March 6, 2018. The court issued a thorough under-advisement ruling on May 4, 2018, in which it terminated Father's rights based on mental illness and 15 months' time in care. The court found that termination would be in E.H.'s best interests because she had bonded with her half-brother and foster placement, and because her foster placement was "willing and eager to adopt both of the children." Although Father's notice of appeal was not timely filed, the juvenile court excused this. *See* Ariz. R. P. Juv. Ct. 104(A); 108(B).

DISCUSSION

¶12 A parent's right in the care, custody, and management of his children is fundamental, but not absolute. *Dominique M. v. Dep't of Child Safety*, 240 Ariz. 96, 97–98, ¶ 7 (App. 2016). To "justify the termination of the parent-child relationship," Arizona courts employ a two-step inquiry. A.R.S. § 8-533(B) (2018); *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ___, ¶ 8 (2018). In a contested termination proceeding, the court first determines whether the state has proven one of the statutory grounds for termination by clear and convincing evidence. A.R.S. § 8-537(A), (B) (2018); *Alma S.*, 245 Ariz. at ___, ¶ 9. Once the juvenile court has found one of the grounds for termination, "the court shall also consider the best interests of the child." § 8-533(B); *Alma S.*, 245 Ariz. at ___, ¶ 8. The finding of parental unfitness

"substantially reduces" the parent's interest in the right to custody and care of the child, and thus, "we can presume that the interests of the parent and child diverge" because of that finding. *Kent K. v. Bobby M.*, 210 Ariz. 279, 286, ¶ 35 (2005). The juvenile court needs only a preponderance of evidence to find that termination is in a child's best interests. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 13 (2016).

¶13 We review termination proceedings for an abuse of discretion. *Titus S. v. Dep't of Child Safety*, 244 Ariz. 365, ___, ¶ 15 (App. 2018). The juvenile court abuses its discretion if its findings of fact are clearly erroneous "or upon a determination that, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof." *Id.* We view the evidence and the reasonable inferences therefrom in the light most favorable to sustaining the court's decision, and we will not reweigh the evidence. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 18 (App. 2009).

I. Statutory Ground

¶14 The juvenile court may terminate a parent-child relationship upon a sufficient showing that "the parent is unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." A.R.S. § 8-533(B)(3). A mental illness is "a substantial mental condition which renders the person unable to discharge parental responsibilities." *In re Maricopa Cty. Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 184 (App. 1984). "Parental responsibilities" do not encompass any exclusive set of factors, but instead are the duties and obligations that people of ordinary intelligence understand parents owe to their children. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 377–78, ¶¶ 19–20 (App. 2010) (citations and quotation marks omitted).

¶15 Before moving to terminate parental rights, DCS "has an affirmative duty to make all reasonable efforts to preserve the family relationship." *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 234–35, ¶ 14 (App. 2011) (quoting *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 186, ¶ 1 (App. 1999)). DCS need not provide every conceivable service, or futile services, but only those with a reasonable prospect of success. *Id.* at 235, ¶ 15 (citations omitted).

¶16 The juvenile court did not err in finding that Father is unable to discharge his parental responsibilities due to mental illness. Father does not contest that he is mentally ill, and his illness is well borne out in the

record. Instead, Father argues either that his illness does not render him unable to discharge his parental responsibilities, or that he will soon be able to discharge those responsibilities with continued services. The record belies each argument.

¶17 Although there is no "exclusive set of factors" for what constitutes "parental responsibilities," *Raymond F.*, 224 Ariz. at 378, ¶ 20 (quotation marks omitted), this Court has held "that the term is susceptible to a sufficiently precise definition" because "the term can be given meaning by reference to other definable sources." *JS-5209 & JS-4963*, 143 Ariz. at 185–86. These include the statutory "duty to protect, train and discipline the child," A.R.S. § 8-531(5)(b), *JS-5209 & JS-4963,* 143 Ariz. at 185, and protecting the child's "right to good physical care and emotional security." *JS-5209 & JS-4963*, 143 Ariz. at 185–86 (citing *In re Maricopa Cty. Juv. Action No. JD-561*, 131 Ariz. 25, 28 (1981)).

¶18 For much of the dependency, Father was not present in E.H.'s life by his own choice. He was inconsistent with his visitations with E.H. starting at the time of his first referral, had visitation referrals unsuccessfully closed out, refused to see E.H. at all for several months, and, after resuming visitation, continued to be inconsistent through the time of trial. Moreover, Father continued to visit with E.H. at the DCS visitation center despite the fact that DCS had approved his home for visitation. With E.H. in a foster placement, one of the few parental responsibilities Father had was to visit her, and the record reasonably supports the juvenile court's conclusion that Father did not adequately fulfill that responsibility.

¶19 The juvenile court was also justified in inferring that Father's mental illness caused his failure to discharge his parental responsibilities. Dr. Silberman testified that Father's mental illness would affect his ability to parent "because of poor judgment and being impulsive and not being stable, getting into conflict with people." This pattern is visible in Father's visitation with E.H.: after getting into a conflict with DCS, Father made the poor decision of refusing to visit E.H., which caused a lack of emotional security for her, as shown in her behavior during the bonding assessment.

¶20 The record in this case supports the juvenile court's finding that there are reasonable grounds to believe Father's condition will continue for a prolonged indeterminate period. Father willfully missed over six months of counseling because of a disagreement with a counselor. Contrary to Father's assertions, the counseling center offered Father a different counselor who reached out to Father on several occasions to no avail. In an addendum to his report, Dr. Silberman wrote that Father needed

to continue counseling and continue to work on managing his anger, either with anger management classes or in counseling. Dr. Silberman testified that counseling would be "very" important for Father and that he would downgrade his prognosis of Father's ability to parent if Father was not regularly attending counseling. Father's case manager testified that DCS's concern was that "[p]ersonality disorders . . . don't get treated with medication, they get treated with counseling." Father's lack of participation in counseling reasonably supports the juvenile court's conclusion that Father's mental illness will continue for a prolonged indeterminate period.

¶21 Because we affirm on the mental illness ground, we do not address the 15 months' time in care ground. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3 (App. 2002) ("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.").

II. Best Interests

¶22 Once the juvenile court finds a parent unfit, "the focus shifts to the interests of the child as distinct from those of the parent." *Alma S.*, 245 Ariz. at ___, ¶ 12 (quoting *Kent K.*, 210 Ariz. at 285, ¶ 31). Termination of the parent-child relationship is in the child's best interests where the child would benefit from severance or where the child would be harmed by continuing the relationship. *Id.* at ___, ¶ 13.

¶23 In making this determination, "[c]ourts must consider the totality of the circumstances existing at the time of the severance determination." *Alma S.*, 245 Ariz. at ___, ¶ 13. After considering all the evidence, if the court finds that the child is adoptable it may also rule that the child's adoptability meets the best interests requirement, but it need not do so. *Alma S.*, 245 Ariz. at ___, ¶ 13; *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, 588, ¶ 11 (App. 2008). Further, while the "focus of the best-interests inquiry is on the child, courts should consider a parent's rehabilitation efforts as part of the best-interests analysis." *Alma S.*, 245 Ariz. at ___, ¶ 15. However, the courts "must not . . . subordinate the interests of the child to those of the parent once a determination of unfitness has been made." *Id.*

¶24 Based on Dr. Bluth's bonding assessment, the juvenile court found that E.H.'s foster mother was "willing and eager" to adopt both E.H. and her half-brother, that E.H. had bonded with her foster mother, and that removing E.H. from her foster placement would be traumatic for her. Dr.

Bluth conducted his bonding assessments in August and September 2017, but the juvenile court ordered a change of custody placing E.H. with new foster parents in February 2018, so Dr. Bluth did not assess the bond between E.H. and her foster parents at the time of trial. *See Donald W., Sr. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 199, 204, ¶ 15 (App. 2007) (in termination cases, juvenile court considers circumstances existing at time of trial). Thus, the court's findings were clearly erroneous. *Civil Rights Div. of Ariz. Dep't of Law v. Amphitheater Unified Sch. Dist. No. 10*, 140 Ariz. 83, 86 (App. 1983) ("A finding can be clearly erroneous when a reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.") (quotation omitted); *see also In re Van Dox*, 214 Ariz. 300, 304, n.3 ¶ 15 (2007).

¶25 However, we will affirm the juvenile court's decision if it is correct for any reason. *In re Maricopa Cty. Juv. Action No. JS-8287*, 171 Ariz. 104, 110–11 (App. 1991). Here, E.H. is adoptable and an adoptive home has been identified that will take both children together. The record supports that termination of Father's parental rights is in E.H.'s best interests. *Alma S.*, 245 Ariz. at ___, ¶ 15.

CONCLUSION

¶26 For the foregoing reasons, we affirm.

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