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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARCUS M., *Appellant,*

v.

DEPARTMENT OF CHILD SAFETY, R.M., *Appellees.*

No. 1 CA-JV 18-0199
FILED 12-18-2018

Appeal from the Superior Court in Maricopa County
No. JD29958
The Honorable Sara J. Agne, Judge

AFFIRMED

COUNSEL

David W. Bell Attorney at Law, Higley
By David W. Bell
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Cathleen E. Fuller
Counsel for Appellee Department of Child Safety

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Marcus M. (“Father”) appeals the juvenile court’s order terminating his parental rights to his son R.M. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In February 2015, the Department of Child Safety removed one-year-old R.M. from the care of his mother (“Mother”) and Father and petitioned for a dependency after Father was arrested and charged with four counts of domestic violence for beating Mother while R.M. was in a nearby room. Mother reported to the police that Father “threw her on the ground, put his foot on her face, kicked her in the groin[,]” and “struck her with a ‘bat’ covered in tape.” The Department alleged that R.M. was dependent as to Father because Father abused substances, exposed R.M. to domestic violence, and was unable to provide for R.M.’s basic needs. The Department alleged that R.M. was dependent as to Mother due to abuse and neglect. Father and Mother also had an extensive domestic-violence history.

¶3 In December 2015, Father was convicted of aggravated assault and sentenced to serve six months in jail. In February 2016, Mother moved to have R.M. returned to her physical custody under Arizona Rule of Procedure for the Juvenile Court (“Rule”) 59. The juvenile court granted the Rule 59 motion upon finding that Mother was complying with all offered services. Two months later, however, the Department received information that Mother had two outstanding warrants for her arrest. The Department subsequently removed R.M. from Mother’s care and placed him with his paternal aunt.

¶4 Father was released from jail in June 2016 and placed on three years’ probation. The terms of his probation required him to participate in several services, including a domestic-violence counseling program. To facilitate the goal of reunification, the Department also offered Father a

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variety of services. The Department referred Father for random drug testing, supervised visits, domestic-violence treatment, parenting classes, parent-aide services, and case-aide services. In the Department's progress report to the juvenile court, it indicated that Father "will need to participate in offered services, including[,] if appropriate[,] a psychological evaluation[,] but it never approved such an evaluation as appropriate. Thereafter, Father completed parent-aide services and domestic-abuse treatment.

¶5 The Department noted that R.M. started showing signs of behavioral problems stemming from his visits with Father. At visits, R.M. displayed violent and aggressive behavior. R.M. also experienced behavioral problems at his aunt's house, daycare, and his therapist's office. According to Father's case manager, R.M. was increasingly exhibiting "aggressive behaviors, self-harm, and harm to others[.]" She noted, however, that those behaviors had decreased tremendously when Father was not seeing him. As a result, R.M.'s therapist was concerned that R.M. was unable to cope with the visits with Father. After consulting with R.M.'s therapist, the Department moved to suspend visitation, but the court denied the motion. The Department subsequently made several appointments for Father to meet with R.M.'s therapist to discuss the issue, but Father failed to attend a single appointment, despite being offered transportation. The Department also invited Father to attend Child and Family Team ("CFT") meetings to discuss R.M.'s behaviors and to educate Father about R.M.'s needs. Nevertheless, Father was unwilling to attend those meetings.

¶6 The Department was concerned that Father would fail to follow the terms of his probation. As part of his probation, Father was required to avoid contact with Mother, submit to random drug tests, refrain from using controlled substances, reside in an approved abode, and pay certain fees. Father was nonetheless arrested in September 2017 for having unauthorized ongoing contact with Mother, and he tested positive for oxycodone, missed 17 drug tests, changed residences without prior approval, and failed to pay fees that he owed.

¶7 The Department was also concerned about Father's ability to protect R.M. The Department's concern was largely based on Father's alleged failure to protect R.M. during Father's supervised visit at R.M.'s paternal grandparents' home when Mother arrived brandishing a firearm while intoxicated. Notwithstanding Mother's threatening and aggressive behavior during the incident, Father allegedly urged the grandparents and paternal aunt "not to call the police because it would get [Mother] in trouble

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and that he did not think she would actually hurt [R.M.]” Furthermore, the Department had discovered that Mother and Father had often been residing together and that Father intended to co-parent with Mother, despite being prohibited by his probation from having any contact with Mother.

¶8 Throughout the dependency, the court held several report and review hearings at which it found that the Department was making reasonable efforts to finalize the permanency plan. Father neither objected to those findings nor informed the Department that the services he was offered did not meet his needs. Finally, the court held a contested termination hearing in March and April 2018. At the outset of the hearing, the court again found that the Department had made reasonable efforts to reunify the family, without any objection from Father. The court also received several exhibits and heard testimony from Father, Father’s probation officer, and Father’s case manager.

¶9 Father’s probation officer testified that although she made clear to Father that his probation prohibited him from having any contact with Mother, Father maintained contact with Mother both by phone and in person throughout the dependency. She also reported that she witnessed “ongoing arguing” between Father and Mother. Consequently, she was concerned about Father’s lack of progress in domestic-violence treatment. She noted that a no-contact order is a standard condition of probation in domestic-violence cases because contact between the assailant and victim “doesn’t allow either of them the space to get the help or space they need to be healthy and work on their relationship[.]”

¶10 The probation officer also discussed Father’s employment and housing situation and his drug testing record. She noted that Father had moved at least ten times and had not held a job for more than 90 days throughout the entirety of the case. She further testified that although 38 of Father’s drug test results were negative, Father’s attendance at requested drug screenings had not been “as consistent as [probation] would like.” The probation officer also noted that Father had tested positive for a controlled substance 11 months before the termination hearing. Ultimately, the probation officer testified that although “there [had] been some inconsistencies” in the past, Father had recently been complying with the terms of his probation.

¶11 A Department case manager testified that she was concerned for R.M. because Father did not understand the severity of the trauma that R.M. had gone through and that Father would not be able to “appropriately parent a child with that level of trauma.” In explanation, she noted that

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“there [were] still ongoing concerns about the circumstance of domestic violence in Father’s life[.]” The case manager also testified that the Department knew, with absolute certainty, that Father was having contact with Mother during the dependency. She stated that she had received reports that Mother and Father were continuing their contact during the dependency of the termination proceeding. And although the case manager admitted that Father could gain custody of R.M. if he made the necessary behavioral changes and kept an appropriate home for at least six months, she opined that Father would probably not be able to remedy the circumstances that caused R.M. to be in the Department’s care.

¶12 The case manager further testified that the most important goals that Father was required to meet for reunification were demonstrating healthy relationships and obtaining stable housing and employment. She said, however, that Father had not demonstrated an ability to have healthy relationships. She noted that Father had poor relationships with several members of his family, including Mother and his sister – R.M.’s placement. The case manager also testified that Father could not keep a job more than two or three months. Additionally, she testified that since the beginning of the case, he had moved every two or three months, which created an “unstable condition.” She further testified that she had found only one of Father’s ten apartments to be appropriate for a child, but Father was evicted from that residence. She went on to explain that repeatedly removing a child from one home to another is traumatic and that children need stability.

¶13 As part of his case plan, Father was also required to remain sober. The case manager reported that although the Department had offered Father drug testing services, Father stopped testing in December 2017 and consequently was required to submit to drug tests through his probation. She also noted that Father had a medical marijuana card. Nevertheless, she testified that she did not think substance abuse was keeping Father from reunifying with R.M.

¶14 The case manager testified further that R.M. was in a placement that met all his material needs and was willing to adopt him. At the time of trial, R.M. had lived there for almost two consecutive years. The case manager described the placement as a home free of substance abuse and domestic violence. She further noted that R.M.’s sibling also resided in the home and that R.M. bonded well with all the individuals who lived there. She testified that terminating Father’s parental rights would provide R.M. with a safe and loving home in which he could maintain a relationship with his extended family. She opined that terminating Father’s parental

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rights would be in R.M.'s best interests because he would gain stability and permanency in his life.

¶15 The case manager added that if the dependency were to continue, she would like Father to complete a psychological evaluation to help determine what other services the Department could offer him. She clarified later, however, that she was only considering offering Father a psychological consultation to determine whether a psychological evaluation was appropriate. She further testified that she was not qualified to assess or diagnose psychological issues. She also noted that Father had received several psychological consultations throughout the dependency. Asked whether the previous psychological consultations suggested that Father should have received a psychological evaluation, the case manager stated that the matter had been "brought up" but her supervisors never approved one.

¶16 Father testified that he had lived in six or seven residences since his June 2016 release from jail. He said that at the time of the termination hearing, his living situation and income were stable enough to support a child. He testified that he was employed as a fiber optics splicer and made \$22 per hour. Father also discussed his relationship with Mother. He testified that before he was arrested for violating his probation, he informed his probation officer that he was keeping a relationship with Mother and "trying to make it work." Father further testified that he assaulted Mother in February 2015 because he suspected that Mother was taking money from him and was being flirtatious with another man. He also stated that although he had exposed R.M. to domestic violence in the past, he would not do so again.

¶17 After hearing the evidence, the juvenile court terminated Father's parental rights to R.M. under the 15 months' out-of-home placement ground. The court found that R.M. had been in an out-of-home placement since February 2015, the Department had made diligent efforts to provide appropriate reunification services, Father had been unable to remedy the circumstances that caused R.M. to be in an out-of-home placement, and a substantial likelihood existed that Father would not be capable of exercising proper and effective parental care and control in the near future. In making its decision, the court considered the evidence for and against termination. Although the court noted that Father had made some improvements in his ability to care for R.M., it also noted that Father had had more than ten residences, had been unable to secure appropriate housing, had missed several drug tests, and had not held a job for more than 90 days. It further noted that R.M. exhibited aggressive behaviors after

visits with Father and that “it would likely be a year or more before Father might be in a position to parent[.]” Additionally, the court noted that Father did not voice concerns about the case plan or the services that were provided to him. The court further found that terminating Father’s parental rights was in R.M.’s best interests because it would further the plan of adoption and provide him with stability and permanency. The court also noted that R.M. was residing in an adoptive kinship placement that met all his needs. Father timely appealed.

DISCUSSION

¶18 Father argues that the juvenile court erred by finding that the Department made diligent efforts to provide him with reunification services and that he would be incapable of providing proper parental care in the near future. We review a juvenile court’s termination order for an abuse of discretion. *E.R. v. Dep’t of Child Safety*, 237 Ariz. 56, 58 ¶ 9 (App. 2015). Additionally, we will affirm an order terminating parental rights so long as reasonable evidence supports the order. *Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, 93 ¶ 18 (App. 2009). To terminate parental rights, the juvenile court must find by clear and convincing evidence the existence of at least one of the statutory grounds for termination and find by a preponderance of the evidence that termination is in the child’s best interests. *Jennifer S. v. Dep’t of Child Safety*, 240 Ariz. 282, 286 ¶ 15 (App. 2016).

1. Statutory Ground for Termination

¶19 As pertinent here, to terminate parental rights under the 15 months’ out-of-home placement ground, the juvenile court must find by clear and convincing evidence that (1) the child has been in an out-of-home placement for a cumulative total period of 15 months or longer pursuant to court order, (2) the Department made diligent efforts to provide appropriate reunification services, (3) the parent has been unable to remedy the circumstances that caused the child to be in an out-of-home placement, and (4) a substantial likelihood exists that the parent will be incapable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c); *Kent K. v. Bobby M.*, 210 Ariz. 279, 288 ¶ 41 (2005).

¶20 The juvenile court did not abuse its discretion by finding that the Department proved the requirements for termination under A.R.S. § 8-533(B)(8)(c). As of the date of the termination hearing, R.M. had been in an out-of-home placement for about three years. And the record shows that the Department made diligent efforts to provide Father appropriate

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reunification services, including parent-aide services, case-aide services, domestic-violence classes, parenting classes, drug testing, and transportation. Further, the record supports the juvenile court's finding that Father failed to remedy the circumstances that led to the Department taking custody of R.M. Despite many months of services, Father maintained unstable housing, kept unauthorized contact with Mother after he was convicted of domestic violence against her, continued to argue with Mother, and was unable to retain stable employment during R.M.'s dependency. Additionally, the Department case manager opined that Father would probably not be able to remedy the circumstances that caused R.M. to be in the Department's care. Thus, the record supports the court's finding that the first three requirements under A.R.S. § 8-533(B)(8)(c) were satisfied.

¶21 The record also supports the juvenile court's finding that a substantial likelihood existed that Father would be unable to effectively parent R.M. in the near future. The Department had specific goals for Father to accomplish: demonstration of his ability to protect R.M. and keep him safe from harm, maintenance of a safe and stable home environment, remaining clean and sober, and a demonstration of parenting skills. Father's conduct during the incident when Mother showed up with a firearm at R.M.'s paternal grandparents' home, however, clearly showed that Father had not achieved the necessary parenting skills to protect and safely parent R.M. Further, Father's opposition to and failure to attend any of the therapist appointments and CFT meetings, despite being provided special accommodations so he could attend, demonstrates that he was not prepared to care for R.M. Moreover, the record shows that Father was unable to maintain stable housing, failed to hold a job for more than 90 days, missed at least 17 drug tests, and tested positive for oxycodone. As such, sufficient evidence supports the juvenile court's finding that a substantial likelihood existed that Father would be unable to effectively parent in the near future.

¶22 Father nevertheless claims that the juvenile court erred by finding that the Department made diligent efforts to provide him with reunification services because the Department had failed to refer him for a psychological evaluation. Father has waived this argument on appeal because he never requested additional services or otherwise objected to the manner in which the reunification services were being rendered, despite having several opportunities to do so throughout the proceeding. *See Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 178 ¶ 13 (App. 2014); *see also Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 235 n.8 ¶ 15 (App. 2011) (noting that a parent who does not object to the adequacy of the

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Department's efforts to provide reunification services at the juvenile court, despite having multiple opportunities to do so, waives the argument on appeal). Father had the opportunity to raise the issue as early as April 2016 during a report and review hearing. Additionally, he could have requested an evidentiary hearing on any matter, including services, yet failed to do so. *See* Ariz. R.P. Juv. Ct. 58(D) ("Any party seeking an evidentiary hearing on any issue shall file a motion requesting that the matter be set for a contested hearing."). The dependency process demands that parents voice their concerns about services to the juvenile court in a timely manner and "it serves no one to wait to bring such concerns to light for the first time on appeal." *Shawnee S.*, 234 Ariz. at 178 ¶ 16. "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.

¶23 Even absent waiver, the record supports the conclusion that the Department made diligent efforts to provide appropriate reunification services. Although the Department did not authorize a psychological evaluation that Father now contends should have been provided, the record reflects that the Department offered Father an array of services, such as parent-aide services, case-aide services, drug testing, domestic-violence classes, parental education courses, and transportation. *See Christina G.*, 227 Ariz. at 235 ¶ 14 (noting that the Department is not required to provide every conceivable service to aid a parent in reunification). Thus, the juvenile court did not abuse its discretion by finding that the Department provided appropriate reunification services.

¶24 To bolster his diligent efforts argument, Father relies on *Mary Ellen C.*, which addressed the Department's obligation to provide mental-health services to parents before terminating parental rights on the mental-illness ground under A.R.S. § 8-533(B)(3). 193 Ariz. 185, 191–92 ¶¶ 29–34 (App. 1999). In *Mary Ellen C.*, the Court determined that the Department failed to provide psychiatric services that had been recommended by a physician specializing in psychology. *Id.* at 192 ¶ 35. In this case, however, a case manager—and not a physician—testified that providing Father a psychological evaluation was *considered* but never approved by her supervisors. Moreover, the record does not support Father's contention that a "consulting psychologist" recommended a psychological evaluation. Thus, we find no error based on the argument that the Department had a duty to provide Father with a psychological evaluation.

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¶25 Father further contends that, because he demonstrated improved parenting skills, the juvenile court erred in finding that a substantial likelihood existed that Father would be unable to effectively parent in the near future. Father cites evidence that he had successfully completed a domestic-violence program and parent-aide services. The record, however, does not require Father's conclusion. Even with the improvement he showed as the termination hearing approached, the record shows that Father failed to make the necessary behavioral changes that allowed for family reunification and that his participation in services had been inconsistent throughout the dependency. Moreover, the case manager expressed fears about returning R.M. to Father's care because he would not protect him from Mother. Therefore, sufficient evidence supports the juvenile court's contrary conclusion. Even if the juvenile court could have decided either way on the issue, this Court "does not sit to second-guess the tough discretionary calls of front line decision makers in the trial courts." *State ex rel. Romley v. Superior Court*, 170 Ariz. 339, 343 (App. 1991).

2. Best Interests

¶26 Although Father does not challenge the juvenile court's best interests finding, the record adequately supports the finding that R.M. would benefit from termination of Father's parental rights. Terminating parental rights is in a child's best interests if the child will benefit from the termination or will be harmed if the relationship continues. *Shawnee S.*, 234 Ariz. at 179 ¶ 20. In determining whether the child will benefit from termination, relevant factors to consider include whether the current placement is meeting the child's needs, an adoption plan is in place, and if the child is adoptable. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3-4 ¶ 12 (2016).

¶27 Here, the case manager testified that R.M. was in an adoptive placement that met all his needs. She further testified that his adoption would give him a safe and drug-free home. Lastly, the case manager stated that termination would provide R.M. with stability and permanency in his life. Thus, the juvenile court did not abuse its discretion by finding that terminating Father's parental rights was in R.M.'s best interests.

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CONCLUSION

¶28

For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
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