IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NYONZIMA E., CECILE N.,
Appellants,

v.

DEPARTMENT OF CHILD SAFETY, H.D., N.J., N.Y., Y.S., I.S.,
Appellees.

No. 1 CA-JV 18-0216
FILED 12-27-18

Appeal from the Juvenile Court in Maricopa County
No. JD32392
The Honorable Jeanne M. Garcia, Judge

AFFIRMED

COUNSEL

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By Steven Czop
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By JoAnn Falgout
Counsel for Appellee Department of Child Safety

Maricopa County Public Advocate's Office, Mesa
By David C. Lieb
Counsel for Appellee N.J.

MEMORANDUM DECISION

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

W I N T H R O P, Judge:

¶1 This case arises out of the juvenile court's grant of motions by the Department of Child Safety ("DCS") appointing Simon Ndabishuriya ("Uncle Simon") as permanent guardian of two minor children, H.D. and N.J. (collectively, the "Older Children"), and for change of physical custody. On appeal, Nyonzima Emmanuel ("Father") and Cecile Nyandwi ("Mother") (collectively, "Parents") raise the following issues:

(1) Did the juvenile court err when it denied Father's request to call the potential guardian, Uncle Simon, as a witness?

(2) Did the juvenile court err in finding that clear and convincing evidence supporting ordering a guardianship of the Older Children by Uncle Simon, and that DCS had made reasonable efforts to reunite Mother with the Older Children?

(3) Did the juvenile court err in finding that a guardianship with Uncle Simon is in the Older Children's best interests?

For the following reasons, we affirm the juvenile court's orders.

FACTS AND PROCEDURAL HISTORY

¶2 Parents are natives of the east African Republic of Burundi, and in 2008 they emigrated to the United States as refugees with their three children. In 2010, the family relocated to the Chicago area, where they lived

among extended family, including Uncle Simon. The family moved to Arizona in 2015, and immediately integrated into the local Burundian community. Parents presently have eight children and retain custody of three. Five children have been adjudicated dependent and were the subject of the proceeding at the juvenile court below. The subject of this appeal is only the Older Children: N.J. and H.D., who are ages fifteen and twelve, respectively.

¶3 On February 16, 2016, Father committed physical acts of domestic violence against Mother in front of their children. One of the children called the police from a neighbor's home, stating that Father had choked Mother during an argument. When police arrived, Father had fled and the officers could not immediately locate him. During DCS' subsequent investigation, N.J. revealed she had been "spanked with various objects," and that her brother had been hit with shoes and "with a hanger until it broke." DCS alleged both Father and Mother beat the children.

¶4 Initially, Mother acknowledged the domestic violence, admitting that Father had choked her during a dispute, that the children had been distraught, and that one had fled to a neighbor's to phone police. Shortly thereafter, however, Mother denied that any domestic violence ever took place—a position she continues to take. At trial, Mother testified that there has never been violence in the family's home, and that each of the children who claim otherwise is lying.

¶5 DCS filed a dependency petition with in-home intervention, alleging that the children were dependent as to Mother because of her failure to protect them from domestic violence, and dependent as to Father because he exposed them to domestic violence, failed to meet their basic needs, and was unable to provide proper care due to ongoing alcoholism. Due to Mother's failure to continue participation in the in-home intervention, however, DCS took physical custody of the children a few weeks later and moved for change of physical custody at an April 2016 hearing.

¶6 The Older Children, along with their sibling Y.S., were placed in a group home; two others, N.Y. and I.S. were placed in a licensed foster home. At the time of DCS' initial assessments of the children in April 2016, they exhibited no behavioral or emotional issues. After the children's respective placements, however, several of them began to exhibit behavioral issues. One of the children, I.S., was diagnosed with PTSD, was hospitalized at age four due to self-harm, and required a crisis line to be

called multiple times due to dangerous behavior toward herself or others at her foster placement. She was subsequently medicated and engaged in therapy and an intensive behavior training program. Y.S. and N.Y. each also required behavioral health services. After N.J. exhibited suicidal ideations (for which she was hospitalized) and offered to help Y.S. commit suicide, N.J. was prescribed a variety of medications and engaged in psychiatric evaluations.

¶7 The children were adjudicated dependent as to both Parents in October 2016, and the court moved forward with reunification efforts. DCS referred Parents to various services, including parent-aide services, individual therapy for domestic violence, psychological evaluations, supervised-visit-only parent-aide services, child and family team meetings, translation services, and transportation. DCS also referred Father to anger-management therapy and substance abuse treatment and testing.

¶8 Father completed parent-aide services and domestic violence counseling, and participated in alcohol testing for five months beginning March 2016. Of the eleven tests he was required to take, he only completed four—one of which tested positive for alcohol. Despite this, Father continued to deny any alcohol use. Later, Father underwent a psychologic evaluation by Dr. Joseph Bluth, who testified at trial that Father was not minimally adequate to parent and the children would be at risk in his care.

¶9 During the evaluation, Father explicitly denied ever committing any acts of domestic violence. Father conveyed to Dr. Bluth (and testified at trial) that he believes this entire proceeding is a conspiracy by DCS against him—to take his children from him and make money—and that his children's behavioral and emotional problems are a result of DCS intervention. Dr. Bluth opined that Father would likely require "at least a year of psychotherapy" to "breakthrough [sic] that wall of denial that [Father] built up around him[self]." Dr. Bluth testified that prior to Father completing that, however, the children would not be safe in Father's care.

¶10 Mother also completed parent-aide services and domestic violence counseling, and underwent a psychological evaluation by Dr. Jonathon Shelton. In Dr. Shelton's report and testimony, he stated that Mother—like Father—maintained that there was no domestic violence in their home. She conveyed to Dr. Shelton that injuries she had sustained were the result of being hit by a truck and, on the night the children called 9-1-1, from falling down stairs. At trial, Mother testified that she believes continued DCS services and family counseling are only necessary to address the harm DCS has inflicted upon her children.

¶11 Dr. Shelton expressed his opinion that Mother's denial of any domestic violence and minimization of problems in the home were likely a result of Burundian cultural norms, and stated that as such, Mother "may place the children at risk for abuse or neglect," in part to "stay safe from [Father]." Dr. Shelton recommended the children not be returned to Mother's care until she completed domestic violence counseling with a master's level therapist with experience "treating individuals and families with a history of trauma, and significant cultural differences, such as refugees from foreign countries."

¶12 With respect to the Older Children, H.D. stated she did not feel safe with her parents and described a history of ongoing domestic violence. Both Older Children indicated an unwillingness to meet with Parents; accordingly, the Older Children's therapists indicated it would not be helpful to force family therapy on the Older Children. Nonetheless, H.D. did not want to have Parents' parental rights severed because she wanted to maintain a connection with her siblings. She preferred a guardianship placement with relatives in Illinois. N.J. echoed this preference. In December 2017, the court affirmed a case plan of reunification concurrent with a case plan of guardianship for the Older Children.

¶13 DCS supervisor Kristina Harrison testified at trial that "[P]arents had no understanding or recognition of the children's severe behavioral health needs," and they "made it clear to [DCS] on multiple occasions that they have no interest in following through with any of [the mental- and behavioral-health] services" set up for the children once they regained custody. On one occasion, Father arrived early to an art therapy session scheduled for N.J. and canceled it, delaying his daughter's therapy. Parents made further statements indicating their belief that the medications prescribed to the children were also unnecessary. In light of this, Harrison stated her belief that it would be in the Older Children's best interests to be placed in the custody of Uncle Simon.

¶14 Besides their own testimony, Parents presented the testimony of the president of the local Burundi community organization, Samuel Ndayiragije. Due to his position in the community, he had spent considerable time with the family since they moved to Arizona. Ndayiragije testified as to the communal counseling of the Burundi community, and that he had never personally witnessed nor known of any domestic violence issues between Parents or between Parents and their children.

¶15 When Uncle Simon appeared telephonically to observe the second day of trial on March 7, 2018, Father asked the court to allow him to ask questions of Uncle Simon. Because Uncle Simon had not been listed as a witness, and because there had been no timely disclosure, the court denied Father's request. When Uncle Simon appeared at the proceedings in person on May 15, 2018, Father did not renew his request.

¶16 The juvenile court entered its findings in a June 1, 2018 minute entry. The court found the witnesses and experts presented by DCS to be credible, and based on the evidence presented at trial, found "that the [Older Children's] mental and emotional safety would be jeopardized by their return to [P]arents." Accordingly, the court granted physical custody of the Older Children to Uncle Simon, whom the court appointed as permanent guardian.

¶17 Parents' appeal is timely. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 8-235(A), 12-120.21(A)(1), and -2101(B).

DISCUSSION

¶18 We apply an abuse of discretion standard when reviewing both the juvenile court's decision on the admissibility of evidence, *see Alice M. v. Dep't of Child Safety*, 237 Ariz. 70, 72, ¶¶ 7-8 (App. 2015); *State v. Garcia*, 200 Ariz. 471, 475, ¶ 25 (App. 2001), and the court's factual determinations, *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). We do not reweigh the evidence, but determine whether the evidence was sufficient to support the findings of the juvenile court. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 94, ¶ 7 (App. 2009). A court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456 (1982); *see also Torres v. N. Am. Van Lines, Inc.*, 135 Ariz. 35, 40 (App. 1982) (stating discretion abused if "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons").

I. The Juvenile Court's Discretion in Denying Father's Request to Call Uncle Simon as a Witness

¶19 Father appeals the juvenile court's denial of his request to call Uncle Simon as a witness. "Except as provided in [the Arizona Rules of Juvenile Procedure], the admissibility of evidence shall be governed by the Arizona Rules of Evidence" in matters of guardianship. Ariz. R.P. Juv. Ct.

45(A). In Arizona, the juvenile court has full discretion to preclude trial testimony of an undisclosed witness. *Cf. State v. Fisher*, 141 Ariz. 227, 246 (1984) ("The rule in Arizona is that it is frequently not an abuse of discretion for the trial court to permit a previously undisclosed witness to testify if the court believes that no prejudice will result to the accused or that any prejudice which might result may be rectified by other means.") (citation omitted), *abrogated on other grounds by State v. Wilson*, 237 Ariz. 296 (2015).

¶20 Father concedes that Uncle Simon was not part of the pretrial witness list he disclosed to the court and opposing counsel before trial. Before Uncle Simon's telephonic appearance, the record reflects no effort on the part of Parents to request or have a court require Uncle Simon's testimony at trial.

¶21 When the court announced on March 7 that Uncle Simon would be listening in on the proceedings, Father's attorney stated, "I didn't know he was going to be present or we would have wanted to have him as a witness." The procedure of presenting trial witnesses, however, is not governed by whoever happens to appear that day at court. Even assuming Uncle Simon was beyond the subpoena power of Arizona's courts, neither Father nor Mother identified him as an important prospective witness, nor sought to obtain his agreement to voluntarily appear and provide reasonable notice to DCS of the same. Neither did counsel for Parents, with timely notice to DCS, seek judicial intervention in either Arizona or Illinois to compel or arrange deposition or telephonic trial testimony. On this record, there is no basis upon which to conclude the court abused its discretion in rejecting Parents' untimely request to examine Uncle Simon.

¶22 Father further contends in his brief that "[t]he importance of [Uncle Simon's] testimony to this matter cannot be understated." While Uncle Simon's fitness as guardian is obviously of great import to this proceeding, DCS entered into evidence a lengthy home study regarding Uncle Simon's fitness. Upon review of that home study, discussed in Section III, *infra*, we believe the information presented there provided the court sufficient insight into the proposed placement.

¶23 Father points out that despite DCS' concession that she was not timely disclosed as a witness, the court allowed case aide Danette Stark to testify over Mother's objection. In response to the court's further inquiry, Mother's counsel conceded allowing this testimony would not prejudice her client. Based on that concession, the court expressly found no prejudice to Parents and allowed the testimony. The juvenile court has discretion to admit (or not admit) untimely-disclosed witnesses, *see Fisher*, 141 Ariz. at

246, and allowing one untimely witness does not *a fortiori* require the court to allow all others.

¶24 The court did not abuse its discretion by denying Father's request to have Uncle Simon testify as a witness.

II. The Guardianship Order

¶25 Absent clear error, "[w]e will affirm a juvenile court's order based on findings of clear and convincing evidence unless no reasonable evidence supports those findings." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555 (App. 1997) (citing *In re Pima Cty. Juv. Sev. Action No. S-113432*, 178 Ariz. 288, 292 (App. 1993)). The juvenile court may establish a permanent guardianship of a child if such guardianship is in the best interests of the child, and four factors are satisfied. A.R.S. § 8-871(A). Parents challenge only one factor on appeal. Specifically, Parents argue (1) that the court had insufficient evidence to support its finding that DCS made reasonable efforts to reunite Mother with the Older Children; and (2) that a permanent guardianship was not supported by clear and convincing evidence. *See id.* at (A)(3).

A. Whether DCS Made Reasonable Efforts to Reunite Mother with the Older Children

¶26 At trial, DCS must show by clear and convincing evidence that it made reasonable efforts to reunify parents with their children. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶¶ 33-34 (App. 1999). DCS "is not required to provide every conceivable service," *Maricopa Cty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353 (App. 1994), including those services that would be futile, *Mary Lou C.*, 207 Ariz. at 49, ¶ 15 (App. 2004). We defer to the juvenile court's findings of fact, *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002), and provided those findings are supported by reasonable evidence, we will affirm. *Jennifer B.*, 189 Ariz. at 555 (citation omitted).

¶27 The Older Children were adjudicated dependent in 2016 due to the admitted instance of domestic violence. A reunification plan was created, and as part of that, Parents were provided domestic-violence counseling, parent-aide services, couples' counseling, psychological evaluations, supervised visitations, and transportation and translation services. Despite these services—which spanned a period of two years—Mother withdrew her previous admission that Father had committed domestic violence, attacked the credibility of the Older Children, and denied the existence of any problems in their home. She maintained this

denial through the trial, including during her psychological evaluation with Dr. Shelton. Mother testified that, while she would follow through with DCS services if the children were returned, the only value she saw to continuing those services would be to help with the damage DCS allegedly caused to the children.

¶28 The court also noted Parents' belief that the Older Children do not actually require any of the mental health services various professionals have prescribed and DCS has provided. Due to this refusal to acknowledge problems in the home, and that the Older Children required ongoing services, Dr. Shelton assigned Mother a "guarded" to "poor" prognosis regarding her potential to adequately parent the dependent children in the future. Regarding family therapy, Dr. Shelton deferred to the opinion of the Older Children's therapists as to whether such efforts would benefit the children. Because the Older Children's therapists thought family therapy would only serve to harm the children at this point, Dr. Shelton stated that there was nothing further that could be done to reunify the family at the time.

¶29 The juvenile court noted that the Older Children "express fear of [P]arents" and "have steadfastly refused" visits, presumably due to Parents' acts of domestic violence and continued refusal to acknowledge any domestic problems. Accordingly, the court found that "[i]t would be futile to refer the [Older Children] for family therapy because they will not attend and should not be forced to attend."

¶30 The Older Children's reluctance to participate in services is primarily relevant to the best interests factor. *Cf. Desiree S. v. Dep't of Child Safety*, 235 Ariz. 532, 535, ¶ 13 (App. 2014) ("[T]ermination cannot be predicated solely on the best interests of the child.") (citation and quotations omitted). However, we find no error when the juvenile court considers the Older Children's steadfast and repeated refusal to meet with their parents—especially when such refusal is based on consistently-expressed fear, and when expert testimony supports that it would be harmful to the children—in determining whether "further efforts would be unproductive." A.R.S. § 8-871(A)(3).

¶31 The record supports the juvenile court's determination that reasonable efforts have been made (and failed), and further efforts would be futile.

B. Whether Sufficient Evidence Supported Appointment of Uncle Simon as Guardian to the Older Children

¶32 Father argues that a permanent guardianship with Uncle Simon was not supported by clear and convincing evidence. Again, we defer to the juvenile court's findings of fact, *Jesus M.*, 203 Ariz. at 280, ¶ 4, and will affirm provided reasonable evidence supports those findings, *Jennifer B.*, 189 Ariz. at 555 (citation omitted).

¶33 The record supports the court's finding that the Older Children steadfastly maintained their refusal to see Parents. H.D. stated she did not feel safe with her parents and described a history of ongoing domestic violence. As discussed in paragraph 30, *supra*, while the juvenile court may not assign a guardianship based solely on the refusal of a child to meet with her parents, the court is certainly not precluded from considering the child's refusal, and the circumstances surrounding such refusal, and giving such evidence appropriate weight.

¶34 Furthermore, the record supports the court's finding that Parents' behavior—both their past behavior, and how they conveyed how they will behave in the future—supports the guardianship. Father provided no justification for cancelling and thus delaying N.J.'s prescribed art therapy. Parents refuse to take any responsibility for their children's obvious mental-health issues or acknowledge any domestic problems, despite DCS' contemporaneous records and the testimony of the case agent and psychology experts.

¶35 The juvenile court had ample evidence to support granting DCS' motion to appoint Uncle Simon as guardian. The court did not abuse its discretion.

III. The Finding that a Guardianship with Uncle Simon Is in the Older Children's Best Interests

¶36 Finally, A.R.S. § 8-871(A) requires the juvenile court find "the prospective guardianship is in the child's best interests." In establishing best interests, it may be shown that the child stands to gain an affirmative benefit from placement with the proposed guardian, or that the child will suffer a detriment if the guardianship is denied. *See Jennifer B.*, 189 Ariz. at 557 (discussing best interests in a severance proceeding) (citation omitted). Parents do not challenge the statutory appropriateness of Uncle Simon's nomination, *see* A.R.S. § 8-871(B); only that vesting him with guardianship is not in the Older Children's best interests.

¶37 The affirmative benefits to be gained by the Older Children's placement in Uncle Simon's care are well-supported by the record. In determining Uncle Simon's fitness, the court relied primarily on the Interstate Relative Homestudy (the "Homestudy") conducted to determine Uncle Simon's lifestyle, income, housing situation, and other details salient to the proposed guardianship. The Homestudy revealed that Uncle Simon earns a sufficient income, but that he would be willing to seek additional income if it became necessary.

¶38 Consistent with Burundian culture, he resides with other members of the Older Children's maternal family—family members with whom the Older Children previously lived before moving to Phoenix. The Older Children would have a large familial support network and ample caregivers as needed based on Uncle Simon's work obligations and schedule.

¶39 Uncle Simon and the family members with whom he lives purchased a house so that the Older Children could move in. The Homestudy reflects that the home is clean, spacious, and close to schools, hospitals, and other community resources. Uncle Simon conveyed that "his main motivation is to make sure that the children are safe and taken care of," and that it "would not be a problem" to protect the Older Children from Parents, were such interaction to become unsafe.

¶40 The record supports the juvenile court's finding that appointing Uncle Simon as guardian would affirmatively benefit the Older Children. Likewise, for the reasons discussed in Section II, *infra*, the juvenile court had ample evidence to find that denying the guardianship would be to the Older Children's substantial detriment. Accordingly, the court did not abuse its discretion in finding the guardianship to be in the Older Children's best interests.

¶41 Finally, in his opening brief, Father argues that the juvenile court abused its discretion in granting DCS' motion to change physical custody of the Older Children to Uncle Simon in Illinois "[f]or the same reasons set forth" in the other sections of his brief. For all the same reasons discussed in this decision, we affirm the court's grant of DCS' motion to change physical custody.

CONCLUSION

¶42 Because the juvenile court did not abuse its discretion in making any of its findings, we affirm the court's order.

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