IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOEL S., JASMINE F., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY, A.G., *Appellees*.

No. 1 CA-JV 18-0177
FILED 1-10-2019

Appeal from the Superior Court in Maricopa County
No. JD21435
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Vierling Law Offices, Phoenix
By Thomas A. Vierling
Counsel for Appellant Joel S.

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

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

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Peter B. Swann joined.

W E I N Z W E I G, Judge:

¶1 Jasmine F. ("Mother") and Joel S. ("Father") appeal the superior court's order terminating their parental rights to A.G. Because reasonable evidence supports the court's termination order, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Father are the biological parents of A.G., born in May 2014. The couple married in June 2016.

¶3 The Department of Child Safety ("DCS") first learned about Mother in connection with D.F., her first child from a previous relationship. D.F. was born in June 2010. Mother tested positive for opioids during the pregnancy. DCS removed D.F. from Mother in 2012 after Mother left the child unattended in the hospital while she went to find drugs. The superior court terminated Mother's parental rights to D.F. in December 2012 based upon substance abuse. Mother nevertheless continued to abuse substances.

¶4 DCS received a hotline complaint in September 2015 about Mother's treatment of A.G., claiming Mother had "almost dropped [A.G.]" while high on drugs. When interviewed by DCS, Father conceded he knew Mother abused pain medication during her pregnancy with A.G. Father wanted Mother to get help but did not intervene, and A.G. remained in Mother's care.

¶5 DCS removed A.G. from Mother in September 2015 and placed him with Father. DCS instructed Father that Mother could not live with or have unsupervised visits with A.G., but Father allowed Mother to have unsupervised access to A.G. As such, DCS removed A.G. from Father a few weeks later, placing him in foster care.

¶6 DCS filed a dependency petition in October 2015, alleging A.G. was dependent as to Mother because of her substance abuse and dependent as to Father because of his failure to protect A.G. from Mother's

substance abuse. The court granted the dependency petition after two hearings in November 2015 and February 2016.

¶7 DCS offered various services to Mother and Father, including parent aide, supervised visitation and drug testing. Mother unsuccessfully sought in-patient substance abuse treatment services from Crossroads on two occasions in late 2015 and 2016, and received substance abuse treatment, individual and couples counseling and psychiatric treatment at Valle del Sol.

¶8 Meanwhile, Mother admitted using drugs or tested positive for drugs in 2016, including benzodiazepines in February, March, April, July and November; opiates in February, March, April and July; heroin in February and March; amphetamines in February; cocaine in March; and morphine in July.

¶9 DCS petitioned to terminate Mother's and Father's parental rights in November 2016 but then referred them for psychological evaluations to assess parenting ability. Mother visited the psychologist, Dr. Menendez, in February 2017. Dr. Menendez recounted Mother's recurring substance abuse and trauma in her report, including a serious head injury from a car accident, and offered contrasting opinions about Mother's parenting abilities. On one hand, she concluded that "lack of parenting skills" was not the primary barrier to Mother's ability to parent. On the other hand, she opined that Mother's prognosis to "demonstrate minimally adequate parenting skills in the foreseeable future [was] poor," causing "the threshold of success for building confidence in her ability to behave pro-socially and protectively over her son [to be] raised."

¶10 Dr. Menendez diagnosed Mother with a combination of impairments that impacted her ability to parent, including a substance abuse disorder, personality disorder of an antisocial nature and "possible impairment from a serious head injury." Dr. Menendez concluded the conditions would continue for a "prolonged, indeterminate period of time." She recommended that Mother continue to receive mental health services, including substance abuse rehabilitation and individual counseling, and mentioned that Mother "should be referred for a neuropsychological evaluation to determine if other services could impact favorably her ability to parent." DCS never referred Mother for a neuropsychological evaluation and Mother never had one.

¶11 Father visited Dr. Menendez in March 2017 and was diagnosed with "[n]eglect of Child, secondary to co-dependency and

partner relationship distress." Dr. Menendez concluded Father was "unable to control [Mother] at the expense of the safety of his son." She recommended "intensive individual counseling by a Spanish speaking counselor" and couples counseling. Father received couples counseling.

¶12 At that point, the superior court dismissed the petition to terminate upon DCS's request and changed the case plan back to family reunification concurrent with severance and adoption. Mother did not, however, stay clean. She relapsed in May and June 2017. She tested positive for opiates, received a prescription for opiates, tried to get more opiates from a hospital, accidentally sent a drug-related text message to a parent aide and occasionally appeared impaired. She also missed several drug tests from July to October 2017.

¶13 DCS again moved to terminate Mother's and Father's parental rights in October 2017 on grounds of at least fifteen months in out-of-home care, and chronic substance abuse as to Mother alone. A.R.S. § 8-533(B)(3), (8)(c). They denied the allegations. Mother continued to relapse, however, testing positive for benzodiazepines and missing two urinalyses in November 2017.

¶14 The severance trial occurred over three days in February and March 2018. The superior court heard from five witnesses, including Mother, her opioid treatment counselor, Father, a parent aide and the DCS case manager. The court determined DCS met its burden for termination. The court rejected Mother's argument that termination was inappropriate based on DCS's failure to refer her for a neuropsychological evaluation. Mother and Father timely appealed.

DISCUSSION

¶15 To terminate parental rights, the superior court must find at least one statutory ground for severance in A.R.S. § 8-533(B) and that termination is in the child's best interests. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12 (2000). The court must also find DCS made diligent efforts to reunify the family when it seeks severance based on time in out-of-home care or substance abuse grounds. A.R.S. § 8-533(B)(8)(c) (fifteen months' time-in-care); *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 453, ¶ 12 (App. 2005) (history of chronic substance abuse). We will affirm the superior court's severance ruling unless it is clearly erroneous and accept its factual findings if reasonable evidence supports them. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3, ¶ 9 (2016).

A. Diligent Efforts

¶16 Mother contests the superior court's diligent efforts finding.[1] DCS need not provide "every conceivable service" or futile services to fulfill its obligation, but must "undertake measures with a reasonable prospect of success" and "provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶¶ 34, 37 (App. 1999).

¶17 The record includes reasonable evidence to support the superior court's finding of diligent efforts. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 81, ¶ 13 (App. 2005) (we do not reweigh the evidence "with respect to the state's diligence"). Mother was offered a psychological evaluation, parent-aide services, supervised visitation, drug testing and a bonding evaluation, along with transportation upon request. She also participated in Valle del Sol support groups for relapse prevention, addiction and parenting, along with individual and couples counseling, methadone treatment and a psychiatric evaluation. DCS did not offer substance abuse treatment to Mother because she was enrolled in such programs at Crossroads and Valle del Sol.

¶18 The record further indicates Mother failed to take advantage of services. She did not complete her drug testing and failed to complete substance abuse rehabilitation. She missed individual and couples counseling appointments. Given this record, we cannot say the court's diligent efforts finding was unsupported by reasonable evidence.

¶19 Mother argues the court erred in finding that DCS made diligent efforts to reunify the family under *Mary Ellen C.*, 193 Ariz. at 192, ¶ 37, because she never received a neuropsychological evaluation recommended by Dr. Menendez. We are not persuaded. *Mary Ellen C.* is different in three critical respects. First, the parent in *Mary Ellen C.* was not offered *any* meaningful services for almost a year after the child's initial removal, and the services finally offered were few and far between. 193 Ariz. at 193, ¶ 38 (agency's efforts were "belated, fitful, and indifferent").

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[1] Father argues the superior court erred in finding DCS made diligent efforts to provide appropriate reunification services pursuant to A.R.S. § 8-533(B)(8)(c) because he "was not afforded sufficient time to reunify with the child after he and Mother made progress in their reunification services." The record does not support his argument. He and Mother did not make enough progress to reunite with A.G. despite having two years to do so.

Here, by contrast, DCS ensured Mother had the opportunity to participate in various services designed to address her substance abuse issues. Nor does the record indicate DCS moved for severance "without checking [the provider's] medical records." *Id*. at 193, ¶ 39.

¶20 Second, the present case has a far more robust record regarding the futility of providing additional services than *Mary Ellen C.* 193 Ariz. at 193, ¶ 39 (evidence insufficient to conclude that offering "additional services would have been futile"). Mother abused various drugs since childhood and was unable to shake her addiction despite frequent attempts and good intentions. DCS successfully moved to terminate her parental rights to a first child because of substance abuse. Yet she continued to abuse drugs, even when pregnant with A.G. Nor did losing A.G. convince her to stop. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379, ¶ 29 (App. 2010) (parent had not overcome dependence on drugs where his abuse continued "despite knowing the loss of his children was imminent"). DCS ultimately removed A.G. from her custody because of substance abuse and initiated termination proceedings. Even then, Mother continued to abuse drugs. At bottom, the record is replete with Mother's relapses, which confirm the futility of offering additional services.

¶21 Third, *Mary Ellen C.* requires that rehabilitative services be provided when capable of restoring a "parent's ability to care for a child *within a reasonable time*." 193 Ariz. at 191, ¶ 31 (emphasis added). Dr. Menendez expressly found, however, that Mother had a poor prognosis for demonstrating "minimally adequate parenting skills in the foreseeable future."

B. Ineffective Assistance of Counsel

¶22 Mother argues her counsel provided ineffective assistance by failing to object to the superior court's findings of diligent efforts at two review hearings before the severance trial. We find no error because Mother points to nothing in the record to indicate the superior court would have reached a different result if her counsel had objected. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 325, ¶ 18 (App. 2007) (parent must "demonstrate that counsel's alleged errors were sufficient to undermine confidence in the outcome of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different") (quotation omitted).

C. Statutory Grounds

¶23 Mother and Father contest the superior court's findings regarding the statutory grounds for termination.

1. Mother

¶24 The superior court may terminate parental rights based upon the chronic substance abuse ground if (1) the parent "is unable to discharge parental responsibilities because of . . . a history of chronic abuse of dangerous drugs" or "controlled substances" and (2) "there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." A.R.S. § 8-533(B)(3). "Chronic substance abuse is long-lasting but not necessarily constant substance abuse." *Jennifer S. v. Dep't of Child Safety*, 240 Ariz. 282, 287, ¶ 17 (App. 2016).

¶25 Mother challenges only the first prong of the chronic substance abuse ground, asserting there is insufficient evidence her "drug use is presently hindering [her] ability to be an effective parent." We find no error. To begin, Mother misstates the necessary showing. DCS was required to prove Mother is unable to discharge her parental responsibilities because of a *history* of chronic drug abuse. Reasonable evidence supports the court's finding that DCS did just that. Mother has an extensive history of drug abuse since childhood. She failed for years to break her addiction and tested positive for drugs as late as November 2017. The record also indicates Mother neglects A.G. when impaired and is unable to care for his needs. *Id*. at ¶ 18 (reasonable evidence showed mother's "chronic substance abuse rendered her 'unable to discharge parental responsibilities'").

2. Father

¶26 The superior court may terminate parental rights based upon the fifteen months' time-in-care ground when (1) the child has been in an out-of-home placement for at least fifteen months, (2) "the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement" and (3) "there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future." A.R.S. § 8-533(B)(8)(c).

¶27 Father concedes the first prong is met, but argues the evidence is insufficient to establish prongs two and three. We disagree. Father has done nothing to indicate he can or will protect A.G. from Mother. Dr. Menendez found he "aligned himself to [Mother]" and blamed DCS and

Mother, which "further remove him from the ability to protect his son." He never grasped the extent of Mother's addiction. And he has not shown a willingness or ability to separate himself from Mother despite the consequences to his parental rights. Reasonable evidence supports the court's ruling.

D. Best Interests

¶28 Mother and Father both challenge the superior court's best-interests finding. Termination is in a child's best interests when the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 6 (App. 2004).

¶29 The superior court concluded that termination of parental rights "would further the plan of adoption." It also found that A.G.'s adoptive placement was meeting his needs, he deserved permanency and stability, and he would suffer without termination and ultimate adoption. Reasonable evidence supports the findings.

CONCLUSION

¶30 For these reasons, we affirm.

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