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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANDY M., *Appellant*,

v.

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

No. 1 CA-JV 19-0036

FILED 7-30-2019

Appeal from the Superior Court in Maricopa County

No. JD32454

The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Maricopa County Legal Defender's Office, Phoenix
By Jamie R. Heller
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Sandra L. Nahigian
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Lawrence F. Winthrop joined.

M c M U R D I E, Judge:

¶1 Andy M. (“Father”) appeals the termination of his parental rights to his child, Siria, born October 28, 2013. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On May 19, 2017, the Department of Child Safety (“DCS”) received a report that Siria’s mother, Keagan J. (“Mother”),¹ and Father had been involved in a domestic violence incident during which Father choked Mother in the presence of Siria and other children. Because of this incident, Father was arrested and subsequently indicted for aggravated assault, a class 4 felony and a domestic violence offense. *See* Ariz. Rev. Stat. (“A.R.S.”) § 13-1204(B). In June 2017, DCS filed an in-home dependency petition requesting Siria and Mother’s other children remain in Mother’s home and alleging Father was “unwilling or unable to provide proper and effective parental care and control by exposing the children to domestic violence.” *See* A.R.S. § 8-201(15)(a)(i). The petition also noted that, in 2007, Father was convicted in the State of Utah for unlawful sexual conduct with a minor. At the initial dependency hearing, Father denied the allegations but submitted the issue to the juvenile court, and the court adjudicated Siria dependent as to Father. Because there were no applicable services that DCS could provide while Father was incarcerated, DCS was not able to offer him reunification services at that time but encouraged him to participate in services provided at the jail.

¶3 In August 2017, the State entered into a plea agreement with Father regarding the aggravated assault charge. Under the terms of the plea agreement, Father agreed to be placed on supervised probation with domestic violence assault terms for four years, including a condition that

¹ Mother’s parental rights to Siria and three of her other children were terminated in the same proceeding. She is not a party to this appeal.

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he have no contact with Mother and her family, and to serve four months in jail. Before the superior court sentenced Father, the juvenile court adjudicated Siria dependent as to Mother and ordered that Siria be placed in out-of-home care. *See* A.R.S. § 8-845(A). On September 15, 2017, the superior court placed Father on probation according to the terms of the plea agreement. Father was released from jail soon thereafter. DCS referred Father for rule-out drug testing and a psychological evaluation. DCS also recommended that Father self-refer for parenting classes and domestic-violence counseling until the results of Father's psychological assessment could be reviewed.

¶4 On November 20, 2017, Dr. Tasha Hagggar performed Father's psychological evaluation. After a clinical interview and personality test, Dr. Hagggar noted that: (1) Father appeared to be a "questionable historian" and minimized the allegations against him; (2) Father's personality test produced a "code type" that was "characteristic of individuals who experience chronic and intense anger"; and (3) Father denied assaulting Mother, claimed that she lied, and "implied that she may have bribed the children to lie." Dr. Hagggar diagnosed Father with "Spousal Violence, Physical (perpetrator)" and recommended Father engage in individual counseling to help "him gain understanding into types of abuse and control, take responsibility for his actions, and gain insight into how exposure to aggression/violence in the home can impact children."

¶5 Concerning Father's 2007 sexual offense conviction, Father disclosed to Dr. Hagggar that he had a relationship with the victim, a 17-year-old girl, when he was 34 years old, but claimed he did not know her age at the time he began the relationship. Dr. Hagggar noted in her report that the Utah police records indicated that "he had dated the victim's older sister prior to his relationship with [the victim]." Father told Dr. Hagggar that he was charged with the crime because the victim's grandmother did not like him and that he only pled guilty to the charges to prevent the victim's grandmother from taking his child from him. He reported that he served five years in prison for the offense and is registered as a level one sexual offender. Given his prior sexual offense conviction and other allegations that Father engaged in sexually inappropriate behavior, Dr. Hagggar recommended that Father participate in a psychosexual evaluation.

¶6 Before DCS could implement Dr. Hagggar's recommendations, Father was arrested for violating the conditions of his probation, including the condition prohibiting contact with Mother. Father was reinstated on four years' intensive probation with a new term of six months' incarceration. Because Father was incarcerated, DCS was unable to refer

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Father for individual counseling and a psychosexual evaluation until he was released from jail in February 2018. After Father's release, DCS scheduled Father to complete an intake for individual counseling in late March 2018 and a psychosexual evaluation in early April 2018. On the day set for Father to attend the intake for individual counseling, however, Father was arrested again for violating the terms of his intensive probation. The superior court reinstated Father on four years' intensive probation and ordered Father to serve 60 days in jail, not to be released until June 9, 2018. Upon Father's release from jail, Father attended an intake for individual counseling. During the intake, Father again denied that he had ever been violent with Mother.

¶7 In July 2018, the juvenile court changed Father's case plan from family reunification to severance and adoption, and DCS moved to terminate Father's parental rights to Siria under the nine months' time-in-care ground, A.R.S. § 8-533(B)(8)(a). While the termination proceedings were pending, DCS amended its motion to add the abuse ground, A.R.S. § 8-533(B)(2).

¶8 During this period, Father continued to attend individual counseling, and DCS again attempted to refer Father for a psychosexual evaluation. In counseling, Father was able to recognize that he had been verbally abusive in the past but maintained that he was "not a person who physically assaults others." Father also reported to his therapist that he only pled guilty to assaulting Mother to prevent Siria from being given up for adoption. As for the psychosexual evaluation, DCS's second referral was closed out unsuccessfully because Father refused to complete the evaluation. Father then scheduled an assessment on his own but refused to attend it once he learned that DCS would need to speak with the evaluation provider before he could complete it.

¶9 In November 2018, the juvenile court held a four-day termination hearing. On the first day of the hearing, Dr. Haggar testified that she remained concerned about the fact that Father had yet to complete the psychosexual evaluation, and reaffirmed her assessment that Father needed to recognize and take responsibility for his behavior to parent Siria safely. On the second day of the hearing, DCS made an oral motion to amend its termination motion to add the fifteen months' time-in-care ground, A.R.S. § 8-533(B)(8)(c). Over Father's objection, the court approved the amendment.

¶10 On the third day of the hearing, DCS called Father to testify. During his testimony, Father claimed he had benefited from counseling and

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had a breakthrough concerning the verbal abuse he committed in the past. Father acknowledged that he had “done everything that [he] pled guilty to.” At the same time, Father repeatedly testified that he never assaulted Mother. He also testified he pled guilty to assaulting Mother to get Siria back faster, not because he committed the assault, and that he was never the aggressor with Mother. Father asserted that any police, DCS, or probation department reports that contravened this narrative were inaccurate. When questioned about his refusal to take a psychosexual evaluation, Father testified he refused because he “wanted a fair and unbiased test without [DCS’s] involvement.” Father explained that he believed DCS would influence the results of the evaluation because DCS had previously submitted “false documents” to the court during the dependency proceedings. On redirect examination by DCS, however, Father stated that he was now willing to take the examination.

¶11 After closing arguments, the court issued a ruling from the bench granting DCS’s termination motion as to Father on all three grounds alleged, and subsequently issued a written order making findings of fact and conclusions of law concerning each ground. Father timely appealed from that order, and we have jurisdiction under A.R.S. § 8-235 and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶12 To support the termination of parental rights, DCS must prove at least one or more statutory ground for termination by clear and convincing evidence. A.R.S. § 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). The juvenile court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). We review the court’s termination decision for an abuse of discretion and will affirm unless no reasonable evidence supports the court’s findings. *Mary Lou C. v. ADES*, 207 Ariz. 43, 47, ¶ 8 (App. 2004).

A. The Juvenile Court Did Not Abuse Its Discretion by Terminating Father’s Parental Rights to Siria Under the Nine Months’ Time-in-Care Ground.

¶13 Father argues reasonable evidence does not support the juvenile court’s order terminating his parental rights to Siria under the nine months’ time-in-care ground. To terminate Father’s rights under this ground, DCS was required to establish by clear and convincing evidence that: (1) Siria had been in court-ordered out-of-home placement for at least

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nine months; (2) DCS made a “diligent effort to provide appropriate reunification services”; and (3) despite these efforts, Father has substantially neglected or willfully refused to remedy the circumstances causing Siria to be in an out-of-home placement. A.R.S. § 8-533(B)(8)(a); *see also E.R. v. DCS*, 237 Ariz. 56, 59–60, ¶ 16 (App. 2015).

¶14 Because Father does not dispute the first or second elements of A.R.S. § 8-533(B)(8)(a), we only address whether reasonable evidence supports the juvenile court’s finding that Father substantially neglected or willfully refused to remedy the circumstances causing Siria to be in out-of-home care. This element turns upon Father’s “effort to cure the circumstances rather than [his] success in actually doing so.” *Marina P. v. ADES*, 214 Ariz. 326, 330, ¶ 22 (App. 2007). For the time-in-care grounds, “circumstances” means “those circumstances existing at the time of the severance’ that prevent a parent from being able to appropriately provide for his or her children.” *Jordan C. v. ADES*, 223 Ariz. 86, 96, ¶ 31, n.14 (App. 2009) (quoting *Marina P.*, 214 Ariz. at 330, ¶ 22).

¶15 Here, the circumstances that were causing Siria to remain in an out-of-home placement at the time of the termination hearing were twofold. First, Father was required to address the domestic violence that gave rise to the dependency and resulted in his conviction for aggravated assault. The DCS case manager assigned to Father’s case testified Father “needed to address the on-going domestic violence concerns, recognizing . . . his anger, his aggression, as well as being able to protect [Siria] from domestic violence.” Second, Father needed to complete the psychosexual evaluation recommended by Dr. Hagggar. The case manager agreed that given Dr. Hagggar’s recommendation, and without a psychosexual evaluation, DCS remained concerned about the possibility of Father “sexually acting out with other minors, including his own child.” She also testified that DCS was concerned because it could not provide Father with specialized services until it could review the results of the completed the psychosexual evaluation.

¶16 In its ruling, the juvenile court found Father “ha[d] not made appreciable, good faith efforts to comply with remedial programs outlined by [DCS].” The court explained that the delays caused by Father’s incarcerations, his refusal to complete the psychosexual evaluation, and his failure to address “the role he has played in the documented domestic violence incidents” demonstrated that Father had substantially neglected or willfully refused to remedy the circumstances causing Siria to remain in out-of-home care. The court also found that Father “continues to take no accountability for his actions dating back to 2006.” Reasonable evidence

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supports these findings and the court's conclusion that termination of Father's parental rights was justified under A.R.S. § 8-533(B)(8)(a).

¶17 Father argues the court erred by not considering his participation in the services offered by DCS to remedy its domestic violence concerns, including a psychological evaluation, an online parenting class, individual counseling, and supervised visits with Siria. However, Father's repeated incarcerations for violating his probation conditions prevented him from meaningful participation in services until June 2018, nearly ten months after Siria was placed in out-of-home care. But more critically, even after Father began participating, his repeated refusal to recognize and take responsibility for the domestic violence which gave rise to the dependency, despite pleading guilty to and serving a jail term for assaulting Mother, belies any claim that he made good-faith efforts to remedy the circumstances which caused and continued Siria's placement in out-of-home care.

¶18 The services DCS offered, in this case, were designed to provide Father with the time and opportunity to engage in behavioral change; that is, to recognize "his anger . . . [and] his aggression, as well as being able to protect his child from domestic violence." *See Mary Ellen C. v. ADES*, 193 Ariz. 185, 192, ¶ 37 (App. 1999) (DCS "must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child"). Instead of making efforts to recognize and fix these issues, Father continuously maintained that: (1) he did not assault Mother; (2) he was never the aggressor with Mother; (3) he only pled guilty to assaulting Mother to avoid having Siria taken from him; and (4) DCS, police, and probation department reports and records detailing his behavior before and throughout the dependency were inaccurate. And although Father claims he "made a key breakthrough by acknowledging he was verbally abusive," towards Mother and others during counseling, Siria was removed from his care because he *physically* abused Mother in Siria's presence. Under these circumstances, the juvenile court correctly found that Father "minimized his responsibility in every conceivable way," and this finding supports the termination of Father's parental rights under A.R.S. § 8-533(B)(8)(a) despite his eventual participation in services.

¶19 The record also supports the juvenile court's finding that Father substantially neglected or willfully refused to remedy the second circumstance causing Siria to remain in an out-of-home placement – DCS's requirement, based on Dr. Haggar's recommendation, that Father complete a psychosexual evaluation. During the termination hearing, Father

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conceded that he had at least three opportunities—twice through DCS and once through a self-referral—to complete the psychosexual evaluation but refused to be evaluated because he “wanted a fair and unbiased test without [DCS’s] involvement.” Father’s testimony established that he willfully and repeatedly refused to remedy a circumstance causing Siria to remain in an out-of-home placement, and the court was well within its discretion to find Father “had no valid reason for refusing [the psychosexual evaluation].” As for Father’s claim during the termination hearing that he now would do the evaluation, we agree with the juvenile court that Father’s belated willingness to complete it was simply “too little, too late.” *Maricopa County Juv. Action JS-501568*, 177 Ariz. 571, 577 (App. 1994).

¶20 Accordingly, we conclude the juvenile court did not err by finding that Father’s refusal to take responsibility for his conduct and complete a psychosexual evaluation justified terminating Father’s parental rights to Siria under the nine months’ time-in-care ground. Because we affirm the juvenile court’s order granting termination on the nine months’ time-in-care ground, we need not address Father’s arguments concerning the abuse and fifteen months’ time-in-care grounds. *See Jesus M. v. ADES*, 203 Ariz. 278, 280, ¶ 3 (App. 2002).

B. The Juvenile Court Did Not Abuse Its Discretion by Concluding Termination of Father’s Parental Rights Was in Siria’s Best Interests.

¶21 Once the court finds a parent unfit under at least one statutory ground for termination, “the interests of the parent and child diverge,” and the court proceeds to balance the unfit parent’s “interest in the care and custody of his or her child . . . against the independent and often adverse interests of the child in a safe and stable home life.” *Kent K.*, 210 Ariz. at 286, ¶ 35. “[A] determination of the child’s best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship.” *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) (emphasis omitted). Courts “must consider the totality of the circumstances existing at the time of the severance determination, including the child’s adoptability and the parent’s rehabilitation.” *Alma S. v. DCS*, 245 Ariz. 146, 148, ¶ 1 (2018). “When a current placement meets the child’s needs and the child’s prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child’s best interests.” *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12 (2016). Finally, “[t]he existence and effect of a bonded relationship between a biological parent and a child, although a factor to consider, is not dispositive in

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addressing best interests." *Dominique M. v. DCS*, 240 Ariz. 96, 98, ¶ 12 (App. 2016).

¶22 Here, the juvenile court found the termination of Father's parental rights was in Siria's best interests because "it would further the plan of adoption, which would provide [Siria] with permanency and stability." Father contends that the totality of the circumstances, including Siria's current placement in a non-adoptive foster home, Siria and Father's positive relationship, and Father's efforts with services, demonstrate Siria would: (1) acquire no benefit from termination; and (2) not suffer harm from continuing their relationship to give Father more time to complete services. We disagree. First, "[i]t is well established in state-initiated cases that [a] child's prospective adoptive is a benefit that can support a best-interests finding," *Demetrius L.*, 239 Ariz. at 4, ¶ 16, even if DCS has not yet found an adoptable child an adoptive placement, *Maricopa County Juv. Action JS-501904*, 180 Ariz. 348, 352 (App. 1994). Second, given our discussion above, we reject the notion that Father's efforts, in this case, could support finding Siria would not benefit from termination or not be harmed by giving Father more time to complete services. Freeing Siria for adoption is a benefit, and this case falls squarely within the express purpose of A.R.S. § 8-533(B)(8) – to expedite the adoption of children languishing in temporary foster care. See *Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 243 (App. 1988). Third, Father's bonded relationship with Siria is not dispositive, and reasonable evidence of Siria's adoptability supports the court's best-interests finding.

¶23 By the time the case manager testified, Siria had been in an out-of-home placement for 15 months. She testified that Siria was doing well in her current placement and that her placement can meet her "physical, social, educational, medical, psychological, and emotional needs." She also testified that, although Siria is not currently in an adoptive placement, she was considered adoptable because "[s]he is young . . . [and] doesn't have any special needs or accommodations that need to be offered." She added that DCS was currently assessing adoptive placement options for Siria and that DCS was "willing to explore any other relatives or friend[s] that either [M]other or [F]ather provide[d]." Thus, we conclude the juvenile court did not err by finding the termination of Father's parental rights was in Siria's best interests.

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CONCLUSION

¶24 For the foregoing reasons, we affirm the juvenile court's order terminating Father's parental rights to Siria.



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