IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARGARET Y., *Appellant*,

v.

JOHN Y., M.Y., M.Y., M.Y., *Appellees*.

No. 1 CA-JV 19-0051
FILED 9-17-2019

Appeal from the Superior Court in Maricopa County
No. JS518754
The Honorable Cynthia L. Gialketsis, Judge *Pro Tempore*

AFFIRMED

COUNSEL

John L. Popilek PC, Scottsdale
By John L. Popilek
Counsel for Appellant

Law Office of Amber L. Guymon PLLC, Chandler
By Amber L. Guymon
Counsel for Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Chief Judge Peter B. Swann joined.

C A T T A N I, Judge:

¶1 Margaret Y. ("Mother") appeals from the superior court's order terminating her parental relationship with her three children. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and John Y. ("Father") are the biological parents of M.Y., born November 2004, M.Y., born May 2009, and M.Y., born May 2009. After 20 years of marriage, the parents separated in January 2014 and divorced that October. Mother and the children remained in the marital home; Father visited the children and paid child support. In the dissolution decree, the parents agreed to equal parenting time and shared the children's expenses.

¶3 After the divorce, Mother struggled financially. When Mother failed to make some mortgage payments, Father paid them in lieu of child support, and Father's new wife ("Stepmother") lent Mother approximately $2,000 for roof repairs. In March 2015, Mother was supposed to have the children over spring break, but she left them with Father. That April, Mother sold the home, netting just under $20,000 for its sale, but she did not repay Stepmother for the roof loan.

¶4 In May, Mother emailed Father, stating, "I am not available to take [the children] to school or take them on my days or weekends anymore starting today, Saturday, May 2nd 2015 you have full custody of our daughters. Do not call me because I will not answer or return any phone calls." Mother also told Father that due to her financial situation, she could not provide for the children, but noted, "when my situation changes, I will address custody at that time." Mother dropped the children off at Father's home, and he and Stepmother became their primary caretakers. For the rest of the summer, Mother video-conferenced with the children but visited them sparingly. Father encouraged visits but asked Mother to "refrain from texting [the oldest child] through her iPod" and to "send [Father] a text" if

she wanted to "FaceTime" with the children. Mother eventually signed a modification agreement giving Father full custody and eliminating his child support obligation. The modification did not require Mother to pay child support.

¶5 In August 2015, Mother moved to Oregon for a higher paying job. Through December, she regularly spoke with the children by text message and video-conferencing. Between December and June 2016, Mother visited the children in Arizona three times and gave them gifts during these visits.

¶6 From June 2016 through February 2018, however, Mother had no contact with the children and provided no support for them, even though she had moved back to Arizona in September 2016. Nor did she send the children cards, gifts, or letters. In February 2018, Father petitioned to terminate Mother's parental relationship due to abandonment, mental illness, and chronic substance abuse.[1] After Father filed the petition, Mother sent the children cards and gifts.

¶7 In July 2018, Polly Thomas, the executive director of a social services agency, submitted a social study in the severance matter. In August, upon stipulation by the parents, the court appointed a therapeutic interventionist to help reintroduce Mother and the children. The parents agreed that no visits between Mother and the children would occur until recommended by the therapeutic interventionist. Although the interventionist recommended starting visits, only individual sessions involving the children and the therapist had been completed as of the date of the termination hearing.

¶8 The superior court held a contested hearing in January 2019 and issued a ruling terminating Mother's parental rights under the abandonment ground. Mother timely appealed, and we have jurisdiction under A.R.S. § 8-235(A).

DISCUSSION

¶9 The superior court is authorized to terminate a parent–child relationship if clear and convincing evidence establishes at least one statutory ground for severance and a preponderance of the evidence shows severance to be in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). We review a severance ruling for

[1] At the termination hearing, Father proceeded on the abandonment ground only.

an abuse of discretion, deferring to the superior court's credibility determinations and factual findings. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7 (App. 2010); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

I. Abandonment.

¶10 Abandonment as a basis for severance is defined as:

> the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. §§ 8-531(1), -533(B)(1). "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 18 (2000). When circumstances prevent a parent from exercising traditional methods of bonding with her child, she "must act persistently to establish the relationship however possible and must vigorously assert [her] legal rights to the extent necessary." *In re Pima Cty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97 (1994).

¶11 It is undisputed that Mother did not provide support for and had no contact with the children for over one-and-a-half years, effectively abandoning the children. According to Mother, she had just cause for her lack of contact with the children because Father alienated them from her.

¶12 Mother asserted that she stopped communicating with the children in part because Father "harassed" her by asking repeatedly about the $2,000 Stepmother had loaned her. But Father denied that he harassed Mother, and indicated instead that he had simply "reminded her . . . from time to time because there . . . were things that occurred in our life where that money was . . . really needed." Although financial issues caused tension between the parents, the record does not establish that Father conditioned Mother's ability to visit the children on the loan repayment.

¶13 Mother also argues that Father alienated her from the children because around June 2016 he told her the children "needed time" and informed her that "they'll contact you." When asked about this comment,

Father denied that he ever prevented Mother from reaching out to the children, and he indicated that he assumed they would continue the same visitation schedule through video-conferencing after Mother returned to Oregon in June 2016. Regardless, Mother does not demonstrate how Father's statements prevented her from asserting her parenting time. Moreover, there is no evidence that Mother even attempted to contact the children for the next 20 months.

¶14 Mother further argues that her financial issues were just cause for her lack of contact with the children because she had to move to Oregon to pursue a higher paying career. But Mother's finances did not prevent her from visiting the children in person or through video-conferencing while she was living in Oregon. Moreover, after moving back to Arizona in August 2016, Mother continued earning a salary comparable to her salary in Oregon, lived very close to Father's home, and knew the children's location and contact information. Nevertheless, she did not inform Father or the children that she had moved back to Arizona, provide any support for them, contact them in any manner, or seek to enforce her court-ordered parenting time. Although Mother testified that she never intended to relinquish her parenting time with the children, she took no actions to assert that right or maintain a normal parent–child relationship with the children. *Michael J.*, 196 Ariz. at 251, ¶ 25 ("The burden to act as a parent rests with the parent, who should assert [her] legal rights at the first and every opportunity.").

¶15 For these reasons, Thomas opined in her social study that Mother "voluntarily . . . weaned herself from the children. She just very slowly no longer communicated with them." Both Thomas and the children's counselor testified that they saw no evidence that Father caused the children's visits with Mother to wane or that Father or Stepmother were speaking negatively about Mother to the children. Overall, reasonable evidence supports the superior court's finding that Mother failed to demonstrate just cause for failing to maintain contact and a relationship with the children.

II. Services.

¶16 Mother argues that because Father alleged substance-abuse and mental-illness grounds, he was required to facilitate reunification services for her or prove that to do so would have been futile. It is well-settled that in cases in which the State proceeds to severance on the substance-abuse or mental-illness ground, the State is required to make a diligent effort to provide a parent with appropriate reunification services.

See Jennifer G. v. Ariz. Dep't of Econ. Sec., 211 Ariz. 450, 453, ¶ 12 (App. 2005); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 191, ¶ 33 (App. 1999). And in *Alyssa W. v. Justin G.*, 245 Ariz. 599, 601–02, ¶ 13 (App. 2018), this court recently recognized an obligation that private parties pursuing severance under the substance-abuse ground show "*that services were offered*, but the parent's [substance] abuse was not amenable to rehabilitative services, or that providing such services would be pointless." But a private party is not required to personally provide the services, and "need only show that the parent whose rights are to be severed has either already received or been offered the necessary rehabilitative services from some provider to no avail or that engaging the parent in rehabilitative services would be futile." *Id.* at ¶¶ 14–15.

¶17 In any event, Mother's argument regarding services is unavailing because, although Father initially alleged the substance-abuse and mental-illness grounds, he expressly withdrew them at the termination hearing. Thus, any alleged error by Father in not facilitating services for Mother was harmless. *See Alice M. v. Dep't of Child Safety*, 237 Ariz. 70, 73, ¶ 12 (App. 2015).

¶18 Mother asserts that this court's holding in *Alyssa W.* should be extended to the abandonment context, suggesting that Father had a constitutional duty to provide her with the time and opportunity to participate in therapeutic intervention. But this court has expressly rejected the argument that reunification serves must be provided when abandonment is the alleged basis for severance. *See Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 64–66, ¶¶ 9–16 (App. 1999) (no duty for the State to provide reunification services when proceeding under the abandonment ground). Furthermore, Mother waived this argument by failing to raise it in superior court. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987); *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26–27, ¶ 13 (App. 2000). Thus, Mother's argument fails.

III. Best Interests.

¶19 Finally, Mother argues that the superior court erred by finding that severance was in the children's best interests.

¶20 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. To find that termination of parental rights is in the child's best interests, the superior court must conclude that the child would benefit from severance or be harmed by a denial of severance. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 150, ¶ 13 (2018). 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." *Id.* at 148, ¶ 1. Relevant factors in this determination include whether the current placement is meeting the child's needs, whether an adoption plan is in place, and whether the child is adoptable. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3–4, ¶ 12 (2016).

¶21 The superior court found that severance would benefit the children by providing them with permanency and stability. Father and Stepmother were meeting the children's needs and providing a safe and stable home life. The children were bonded with Stepmother, and she wished to adopt them. The oldest child, who is over twelve, consented to adoption by Stepmother. After completing the social study, Thomas concluded that "all three children have established a positive relationship with their stepmother, who has been a consistent parent, has looked after their day-to-day needs, and has been active in the role of a parent" and that "it would be in [the children's] best interest to have a legal relationship with their stepmother." Moreover, the children's therapist testified that they experienced anxiety about reuniting with Mother and were "afraid that they're going to be taken away" from their home with Father and Stepmother. This fear led to nightmares for the two youngest children. The therapist further testified that if the parent–child relationship continued, so too would the children's anxiety. Accordingly, reasonable evidence supports the court's best-interests finding, and we therefore affirm.

CONCLUSION

¶22 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
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