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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MICHELLE S., *Appellant*,

v.

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

No. 1 CA-JV 20-0141
FILED 10-20-2020

Appeal from the Superior Court in Maricopa County
No. JD 505332
The Honorable Kristin Culbertson, Judge

AFFIRMED

COUNSEL

Law Office of Ed Johnson PLLC, Peoria
By Edward D. Johnson
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Doriane F. Neaverth
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Maurice Portley¹ delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Lawrence F. Winthrop joined.

P O R T L E Y, Judge:

¶1 Michelle S. (“Mother”) appeals the superior court’s order terminating her parental rights to her child, H.S. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother has a history of substance abuse, mental-health issues, and engaging in abusive relationships. In January 2017, she was abusing methamphetamine while in an abusive relationship with Jeremy M. (“Boyfriend”). After a childcare worker reported suspicious bruising on H.S., the Mesa Police Department performed a welfare check on H.S. at Mother’s home. Officers found that “[t]he entire surface of [H.S.’s] buttocks was black and blue in color. The markings [were] consistent of that of a belt and handprints.” H.S., who was then five years old, also had bruising on his forehead and a cut on his left cheek. Mother denied knowing how H.S. was injured, but admitted having seen the injuries a few days prior.

¶3 While the officers were arresting Mother, she confessed that Boyfriend, who was hiding in the bathroom, had caused H.S.’s injuries. Boyfriend admitted hitting H.S. with a belt at least “four times.” Officers arrested Boyfriend, and the Department of Child Safety (“DCS”) took custody of the child. Mother was charged with permitting the life, health, or morals of a minor to be imperiled by neglect or abuse under A.R.S. § 13-3619, to which she later pled guilty. DCS placed H.S. with his maternal grandmother and filed a dependency petition, which the superior court granted in due course.

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3 of the Arizona Constitution.

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¶4 About a week after the arrests, Mesa Police conducted a forensic interview with H.S. He confirmed that when he gets in trouble with mom he “get[s] a belt,” Boyfriend hit him more than once, and Boyfriend hurts him “really bad.” He initially stated that Mother does not hit him with a belt, but then stated she does. He later confirmed his bruising was caused by both “Mommy and Mommy’s babe.”

¶5 Despite the fact that Mother remained in contact with and supported Boyfriend during his criminal trial, the domestic violence continued. In April 2017, she told police that two weeks earlier Boyfriend had dragged her into a closet by her hair. In fact, earlier that day Boyfriend had covered her mouth with his hand, pulled her hair, and punched her. She finally ended her relationship with Boyfriend in late 2017.

¶6 DCS offered Mother services to help reunify her with her child during the dependency, including substance-abuse testing and treatment, psychiatric and psychological evaluations, individual counseling, therapeutic visits with H.S., a best-interests evaluation, parenting classes, and a parent aide. H.S. also received services, including high needs case management, psychiatric evaluations, medication management, trauma therapy, and occupational therapy.

¶7 Mother completed a psychological evaluation with Dr. Gregory Novie in April 2017. She admitted that both she and Boyfriend hit H.S. with a belt “at least three times” and that she “kept [H.S.] in a dark room for two or three hours at a time as she just didn’t know what to do disciplining him.” Dr. Novie diagnosed Mother with moderate methamphetamine abuse and borderline personality disorder. He concluded that Mother was not able to demonstrate minimally adequate parenting skills and gave her a guarded prognosis of her future ability to parent H.S.

¶8 H.S. refused to have contact with Mother until June 2017, when Dr. Aaron Wolfley, his trauma therapist, reported that he was ready to begin therapeutic visits. Mother then began individual counseling and therapeutic visits with H.S. Shortly thereafter, however, H.S. began demonstrating emotional and behavioral “dysregulation” – the inability to control emotions and behaviors – which included finger and lip sucking, spanking himself on the bottom, yelling when discussing Mother, inability to sleep without a light on, refusing to go to the bathroom alone, and aggressive behavior toward the family dog. Dr. Wolfley diagnosed H.S. with post-traumatic stress disorder.

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¶9 The following month, H.S.'s grandmother, citing ongoing conflict and harassment from Mother, asked DCS to remove him, and DCS placed H.S. with a foster family. Nevertheless, in January 2018, the superior court denied DCS's request to change the case plan to severance and adoption because Mother was actively engaging in services. The court found that although Mother's continued relationship with Boyfriend was "[o]f notable concern," she was still "working to address the issues that led to [the] dependency" and thus it was "not in [H.S.'s] best interest to change the case plan."

¶10 Thereafter, Mother successfully completed substance-abuse testing and treatment, and achieved sobriety. She fully engaged in the parent-aide service, but it was closed out in February 2018 as unsuccessful for failing to achieve all the required protective goals, as well as for concerns about H.S.'s dysregulation during visits. She completed parenting classes and progressed in therapy and therapeutic visits.

¶11 Although Mother made commendable progress, DCS had several remaining concerns. Notably, and despite continued therapy, H.S.'s maladaptive behaviors continued to escalate. He regularly exhibited crying, emotional instability, fear, avoidance, aggression, regressive behaviors, and nightmares—behaviors that intensified after visits with Mother and when the therapist would discuss with H.S. the possibility of seeing Mother. In 2018, he also began to suffer from night terrors, threatened to self-harm, and made comments about killing Boyfriend and Mother.

¶12 During a meeting in August 2018, Dr. Wolfley expressed concern that if the case plan remained reunification, H.S.'s behaviors would intensify. By October 2018, H.S.'s behaviors included bed-wetting, nightmares about being killed, crying in his sleep, nail-biting, pulling out his hair during visits with Mother, repetitive physical tics, and negative self-talk, such as "I hate myself." His placement noted that he was often "exhausted after visits with his mother" and would require at least three days to "de-escalate." Dr. Wolfley found that H.S. was particularly reluctant to discuss his interactions with Mother. On Dr. Wolfley's recommendation, H.S. began occupational therapy.

¶13 In December 2018, Dr. Joseph Bluth completed a bonding and comparative best-interests evaluation between Mother and H.S. Dr. Bluth noted that H.S. seemed "indifferent" or "ambivalent" to Mother and found that they share an insecure attachment. By contrast, Dr. Bluth noted H.S. and his foster parents have "a strong bond and attachment," and he

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appeared “more comfortable and calm” with them. Dr. Bluth noted that “if [H.S.’s] trauma reactions begin to increase more substantially, then consideration should be given to discontinuing visitation.” Dr. Bluth concluded that returning H.S. to Mother would be “retraumatizing for him” and recommended severance and adoption by the foster parents.

¶14 During 2019, H.S. demonstrated increased difficulty with transitions, showed reluctance to attend therapy sessions or participate in activities at therapy that he previously enjoyed, and began to “self-regulate” by overeating. Dr. Wolfley noted that H.S. was in a “constant state of hypervigilance, or chronic state of anxiety that creates neurological and developmental damage” and that his exposure to continued changes and lack of permanency presented a consistent barrier to effective treatment and normal development. In July 2019, all of H.S.’s providers agreed that “the most prominent contribution to [his] ‘stress and dysregulation’ and impeding factor preventing” his healing is a “lack of permanency and stability as it relates to reunification or adoption.” DCS therefore moved to terminate Mother’s parental rights under the abuse, mental illness, and fifteen-month out-of-home placement grounds, and the superior court changed the case plan to severance and adoption.

¶15 H.S. completed a psychological evaluation in November 2019 with Dr. Robert Mastikian. Dr. Mastikian confirmed H.S.’s post-traumatic stress disorder diagnosis and further diagnosed him with major depressive disorder. He concluded that H.S.’s trauma placed him at risk for exhibiting aggressive behaviors, mood problems, and sleep difficulties, and he opined the risk “will more than likely continue for an indeterminate period of time.” Dr. Mastikian “strongly recommended that [H.S.] remain in a stable, nurturing, supportive[,] and well-monitored environment” while he continued to process his trauma. Specifically, “[c]aregivers must provide him with unconditional positive regard, support, patience, love and understanding[,] and close supervision.” Without such support, he would likely be unable to “focus[] all of his cognitive and emotional energies on treating his” conditions.

¶16 The superior court held a contested termination hearing over five days in January and February 2020. Mother testified that Boyfriend “[o]ver-disciplin[ed] [H.S.] with a belt” by hitting him and verbally abused him. She further testified that she “spanked [H.S.] lightly with a belt once” and denied ever keeping him in a dark room.

¶17 The DCS case manager testified that she was still concerned about Mother’s ability to regulate her emotions and meet H.S.’s extensive

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needs, including providing him with structure and emotional stability and respecting his boundaries. She also had three additional concerns: Mother did not take responsibility for her abuse of H.S.; did not agree H.S. needed therapy; and was unable to identify H.S.'s triggers or coping mechanisms. Both the case manager and Dr. Bluth testified that H.S. stated he "wants to stay with his current foster placement," not Mother, and he never recognized Mother as a safe person in his life. None of the professionals involved in the case felt that H.S. was ready to return to Mother, despite her engagement in therapy and therapeutic visits. Each of the professionals agreed that H.S. needed permanency to have any chance of fully healing. Finally, the case manager testified that H.S. was bonded to his placement, who was meeting his needs and wished to adopt him.

¶18 The court terminated Mother's parental rights based only on her failure to protect H.S. from abuse. The court also found that Mother lacked credibility when testifying about her relationship with Boyfriend, the number of times she and Boyfriend used corporal punishment on H.S., and her perceptions of placement. Mother timely appealed. We have jurisdiction pursuant to the Arizona Constitution Article 6, Section 9 and A.R.S. §§ 8-235(A) and 12-120.21(A)(1).

DISCUSSION

¶19 Mother argues that no reasonable evidence supports the court's termination order under the abuse ground. As support, she points to her participation and success in most services. She also argues the superior court (1) had previously denied DCS's motion to change the case plan to severance and adoption "on [that] very ground" and (2) found in the termination order, under a different ground, that Mother "would be capable of exercising proper and effective parental care and control in the near future."

¶20 A parent's right to custody and control of his own child, while fundamental, is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶¶ 11-12 (2000). Severance of a parental relationship may be warranted where the state proves one statutory ground under A.R.S. § 8-533 by clear and convincing evidence. *Id.* at ¶ 12. "Clear and convincing" means the grounds for termination are "highly probable or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-85, ¶ 25 (2005) (internal quotations omitted). The court must also find that severance is in the child's best interests by a preponderance of the evidence. *Id.* at 288, ¶ 41.

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¶21 This court “will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002). We do not reweigh the evidence but “look only to determine if there is evidence to sustain the court’s ruling.” *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). Under A.R.S. § 8-533(B)(2), the superior court may terminate a parent’s rights if “the parent has . . . willfully abused a child.” Abuse “includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.” A.R.S. § 8-533(B)(2). Abuse includes both “the infliction or allowing of physical injury” and the infliction or allowing of another person to cause serious emotional damage. A.R.S. § 8-201(2).

¶22 We find Mother’s arguments unpersuasive. She cites no authority that prevents the superior court from declining to change the case plan at one point in a dependency, and later, based on additional facts, changing the case plan and terminating a parent’s rights. Moreover, when the court declined to change the case plan, its concern was H.S.’s best interests; the court did not find that Mother had not abused H.S. or failed to protect him from abuse. And, on appeal, Mother does not challenge the court’s finding that severance of her parental rights was in H.S.’s best interests.

¶23 Moreover, the finding that Mother “would be capable of exercising proper and effective parental care and control in the near future” is not applicable to the abuse finding. *See* A.R.S. § 8-533(B)(2). Whether a parent is capable of effective parental care in the near future is an element the superior court has to consider and resolve under the fifteen-month out-of-home placement ground. *See* A.R.S. § 8-533(B)(8)(c). Because the court made the finding, it did not find that DCS had proven the fifteen-months out-of-home allegation by clear and convincing evidence. The court does not have to consider a parent’s ability to parent in the near future under the abuse provision, and, as a result, the finding has no relevance to the abuse ground. *Compare* A.R.S. §§ 8-533(B)(2) *with* 8-533(B)(8)(c). Accordingly, the finding cannot be used to upend the abuse finding or the finding that termination was in the child’s best interests.

¶24 Finally, reasonable evidence supports the superior court’s determination that Mother failed to protect H.S. from abuse, resulting in his severe physical and emotional harm. She admitted to police that she had asked Boyfriend to help discipline H.S. and knew Boyfriend had beat H.S. with a belt “at least three times.” She did nothing to protect H.S. from the

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abuse. And although she saw his significant injuries, she did not seek medical care for his injuries. Mother eventually pled guilty to “permitting [the] life, health, or morals of a minor to be imperiled by neglect or abuse.” The abuse caused H.S. both physical injuries, which the police documented, and severe emotional trauma, leading to his diagnoses of post-traumatic stress and major depressive disorders. Accordingly, the evidence supported the court’s finding by clear and convincing evidence.

CONCLUSION

¶25 For the foregoing reasons, we affirm.



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