IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAYSON V., *Appellant*,

v.

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

No. 1 CA-JV 21-0122
FILED 10-19-2021

Appeal from the Superior Court in Maricopa County
No. JD532532
The Honorable Cassie Bray Woo, Judge

AFFIRMED

COUNSEL

Thomas Vierling Attorney at Law, Phoenix
By Thomas A. Vierling
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Amanda Adams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the court, in which Judge Brian Y. Furuya and Judge Michael J. Brown joined.

H O W E, Judge:

¶1 Jayson V. ("Father") appeals the juvenile court's order granting permanent guardianship of his daughter, A.V., to the child's maternal great-grandmother, Deborah E. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the juvenile court's order. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 2 ¶ 2 (2016). Father and Cassie E. ("Mother")[1] are the biological parents of A.V., born in 2017. Before the Department's involvement, A.V. had visits with Father every weekend. In May 2019, A.V. was residing with Mother and Joshua A., Mother's significant other, when Joshua A. was shot outside of their residence. Responding police officers found marijuana near A.V.'s sleeping area and an empty gun holster on the bed. Joshua A. had a criminal history, admitted to using drugs a few times a week, and helped take care of A.V. Domestic violence was also an issue between Mother and Joshua A.

¶3 Soon after the shooting, Mother and Joshua A. left with A.V. and did not disclose their location to the Department for the next week. The Department petitioned for temporary physical custody of A.V. Because Father's location was unknown, the Department alleged that he neglected A.V. "by failing to provide the child with the basic necessities, food, clothing, shelter, medical care and parental supervision" and "by failing to maintain a normal parental relationship with the child." Once A.V. was returned, the Department placed her with Deborah E. and her husband; Mother also lived with them. The day after, the Department successfully contacted Father, who began supervised visits with A.V.

[1] Mother is not subject to this appeal because she did not contest the guardianship.

¶4 The Department provided Mother and Father with substance-abuse testing, substance-abuse treatment through TERROS, parent-aide services, and taxi services starting in June 2019. Mother admitted her inability to engage in services and acknowledged Deborah E. as the right person to care for A.V.

¶5 Father did not complete a hair follicle test, claiming that his hair is too short and he has no body hair. Out of 23 scheduled drug tests between July and December 2019 at Physician Services, Inc. ("PSI"), he completed and tested negative only once. In July 2019, Father moved for temporary custody of A.V. A month later, the Department amended its petition, changing its allegations to claim that "Father [was] unable to parent due to substance abuse." The allegations also stated that Father did not complete a hair follicle test, had a history of marijuana and charges for possession of drug paraphernalia, and had an active warrant for his arrest issued in June 2019. Because Father obtained his medical marijuana card in November 2019, his previous marijuana use was illegal. The court found A.V. dependent as to both parents in January 2020; the basis for Father's dependency was substance abuse. He appealed this decision and this court affirmed.

¶6 Between January and May 2020, Father failed to complete 32 scheduled drug tests at PSI and only sporadically completed the tests starting in June of that year. The court ordered him at three separate hearings to complete random urinalysis drug testing for 30 consecutive days and if he "test[ed] clean of all substances with the exception of THC," the Department would transition A.V. to his care. Father did not complete all the tests but the few he completed were negative. Father was referred to TERROS five times and completed an assessment in June 2020. TERROS did not recommend services to him.

¶7 In December 2020, the Department moved to appoint a permanent guardian for A.V. The court later conducted a contested guardianship hearing. Father testified that he did not participate in the drug tests because he would be positive for marijuana.

¶8 At the hearing, the case manager expressed concerns about Father's substance abuse and anger. She testified that his failure to participate in drug testing was a barrier to reunification because it suggested that Father was still using drugs. Father needed to demonstrate sobriety through negative drug tests for an accurate psychological evaluation to take place to assess his domestic violence and anger issues. Domestic violence occurred between Father and Mother. Father also

reportedly became angry with multiple people, including A.V. Specifically on one occasion, while the case manager explained to Father about how drug testing is a barrier to reunification, his behavior shifted from polite to irate. The case manager testified that "[h]e became very tense. His eye contact became very defined, as in he would not look away from me. I could sense that he was very angry just by the change of his demeanor." On a separate occasion, Father snapped at a different case aide because of the way A.V. was buckled in the car. He reportedly also became frustrated while potty training A.V. As a result, she cried and threw temper tantrums, which was unusual behavior for her, considering her "happy-go-lucky" demeanor.

¶9 Father testified that he loves A.V. and that the parent aide did not have concerns with his ability to parent after he completed parent-aide services in April 2020. Father also claimed that he does not get angry anymore. He currently lives with his father and testified that he could stay there indefinitely. While Father does not have stable employment, he works as a day laborer and is always looking for employment if currently unemployed. He also has the financial means to support A.V.

¶10 Deborah E. has cared for A.V. since May 2019 and has expressed her willingness to be her permanent guardian. She testified that she would provide A.V. with a safe and stable home as well as support her emotional, medical, psychological, and educational needs. The case manager testified that Deborah E. is a fit and proper person to be A.V.'s guardian because she prioritizes A.V.'s best interests, engages with her development, and has created a bond with her. A.V. is developing normally for her age and doing well in Deborah E.'s care. Deborah E. also would allow A.V. to have a relationship with her parents.

¶11 The juvenile court granted the Department's motion and appointed Deborah E. as A.V.'s permanent guardian. The court found by clear and convincing evidence that (1) guardianship was in A.V.'s best interests, (2) A.V. had lived with Deborah E. for at least nine months, (3) the Department made reasonable efforts to unite the parents with A.V. and that further efforts would not be in A.V.'s best interests, and (4) severance and adoption was not in A.V.'s best interests. Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8–235(A), 12–120.21(A)(1), and 12–2101(A)(1).

DISCUSSION

¶12 Father argues that the juvenile court's decision should be reversed and remanded because the evidence does not support the court's finding of permanent guardianship and the court unlawfully shifted the burden of proof to him to prove his ability to parent. Because the juvenile court was in the "best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings," *In re Pima Cty. Dependency Action No. 93511*, 154 Ariz. 543, 546 (App. 1987), we will affirm the juvenile court's order establishing permanent guardianship unless the factual findings are clearly erroneous, *see Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555 (App. 1997), and we will not reweigh the evidence unless no reasonable evidence supports the findings, *see Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280 ¶ 4 (App. 2002).

¶13 The juvenile court did not err because reasonable evidence supports a permanent guardianship for A.V. The court may establish a permanent guardianship if it is in the child's best interests and four statutory requirements are met: (1) the child was adjudicated dependent; (2) the child has been in the custody of the prospective permanent guardian for at least nine months; (3) the Department has made reasonable efforts to reunite the parent and child and further efforts would be unproductive; and (4) severance and adoption would not be in the child's best interests. A.R.S. § 8–871(A).

¶14 Father challenges the findings that the permanent guardianship is in A.V.'s best interests, the Department made reasonable efforts to reunite him and A.V., and further efforts would be unproductive. Permanent guardianship is in a child's best interests if the child "affirmative[ly] benefit[s]" from it or incurs a detriment if not placed with the guardian. *Jennifer B.*, 189 Ariz. at 557 (citing *Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 6 (1990)) (analyzing best interests of the child for revocation of a permanent guardianship). A.V. has affirmatively benefited from residing with Deborah E. because she provides A.V. with a safe and stable home and supports her emotional, medical, psychological, and educational needs. Without Deborah E. as A.V.'s permanent guardian, A.V. will incur a detriment for lack of permanency. A.V. is bonded with Deborah E. and is developing normally in her care. Although Father and A.V. have a bond, the court gives "primary consideration to the physical, mental and emotional needs and safety of the child." A.R.S. § 8–871(C).

¶15 Furthermore, the Department made reasonable efforts to reunify Father and A.V. The Department need not provide parents "every

conceivable service" but should offer them time and opportunity to participate in services to improve their ability to care for their child. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192 ¶ 37 (App. 1999) (finding that the Department did not make reasonable efforts because it did not provide the mother with reunification services for almost a year after removing her child). The Department must "undertake measures with a reasonable prospect of success," *Donald W. v. Dep't of Child Safety*, 247 Ariz. 9, 21 ¶ 46 (App. 2019) (quoting *Mary Ellen C.*, 193 Ariz. at 192 ¶ 34), but the Department is not required to undertake futile measures, *Mary Ellen C.*, 193 Ariz. at 187 ¶ 1.

¶16 The Department provided Father with substance-abuse testing, substance-abuse treatment, and parent-aide services beginning in June 2019. Although he completed his parent-aide services, he refused to complete the court-ordered drug tests to rule out substance abuse and demonstrate that he can safely parent. His continuous refusal rendered further Department efforts futile.

¶17 Father also argues that the court unlawfully shifted the burden of proof to him by ruling that he had to demonstrate that substance abuse is not a concern, instead of requiring the Department to prove that substance abuse impairs his ability to parent. The moving party "has the burden of proof by clear and convincing evidence." A.R.S. § 8–872(G). The burden did not shift. The Department showed that Father was unable to parent by providing evidence of his incomplete court-ordered drug tests. Without consistent negative results, the Department could not rule out substance abuse as a concern and inferred that he continued to consume drugs. Furthermore, "[w]e presume, when reasonable evidence exists on the record, that the court made every finding necessary to support its order." *A.R. v. Dep't of Child Safety*, 246 Ariz. 402, 406 ¶ 12 (App. 2019). Because reasonable evidence exists, the Department met its burden.

¶18 Father also argues that he has a constitutional right to parent. Although the permanent guardianship divests him of legal custody, it does not terminate his parental rights. *See* A.R.S. § 8–872(H). He lost the right to make legal decisions for A.V. because he did not comply with the court-ordered drug tests, though he knew the ramifications. Thus, the guardianship is in A.V.'s best interests because she will live in a safe, drug-free environment.

¶19 Because reasonable evidence supports the factual grounds underlying the juvenile court's grant of permanent guardianship, the court did not err.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

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