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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JACKELYN M.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, E.P., P.M., J.G.,
Appellees.

No. 1 CA-JV 22-0018
FILED 9-20-2022

Appeal from the Superior Court in Maricopa County
No. JD28368
The Honorable Todd F. Lang, Judge

AFFIRMED

COUNSEL

Maricopa County Public Advocate, Mesa
By Suzanne W. Sanchez
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Michelle R. Nimmo
Counsel for Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Michael J. Brown joined.

M O R S E, Judge:

¶1 Jackelyn M. ("Mother") appeals the termination of her parental rights to her three daughters. We affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother has three daughters, E.P. born in 2010, P.M. born in 2016, and J.G. born in 2018. Neither E.P.'s father nor P.M. and J.G.'s father is a party to this appeal.

¶3 In 2014, the Department of Child Safety ("DCS") filed a dependency petition, alleging Mother neglected E.P. due to substance abuse, domestic violence, and a lack of stable housing. Mother successfully completed a case plan of in-home intervention, and the juvenile court dismissed the dependency.

¶4 In 2015, DCS filed a second dependency petition, alleging Mother abused substances and engaged in domestic violence in E.P.'s presence. The second petition also alleged Mother was incarcerated and unable to provide E.P. with proper parental care. The juvenile court adjudicated E.P. dependent. DCS offered Mother reunification services, including substance-abuse treatment and domestic-violence counseling. Mother seldom submitted to drug tests and tested positive for methadone and marijuana.

¶5 During the dependency, Mother became pregnant with P.M. and continued to use methadone and marijuana. In 2017, the court adjudicated newborn P.M. dependent based on Mother's continued drug use and on-going domestic violence. Mother successfully completed substance-abuse and domestic-violence services provided by DCS, and the court dismissed P.M.'s dependency in April 2017 and E.P.'s dependency in January 2018.

¶6 A year later, however, DCS received reports that Mother had been living in a motel with her children, prostituting herself, and using

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cocaine, marijuana, Xanax, and methadone. DCS filed a third dependency petition, alleging that E.P., P.M., and eleven-month-old J.G. were dependent because of substance abuse and neglect. Mother pled no contest to the allegations in the petition. In April 2019, DCS removed the children from Mother's care, placing E.P. with her paternal grandmother and P.M. and J.G. with their paternal grandfather.

¶7 For over two years, DCS offered Mother services, including substance-abuse testing, substance-abuse treatment, individual counseling, psychological evaluations, parent-aide services, and supervised visitation. Mother participated in supervised visits but only sporadically submitted to drug testing and refused the other services. When Mother tested, she was positive for extreme levels of methadone and marijuana. From July 2019 to April 2021, Mother did not drug test at all.

¶8 Mother did not submit to a psychological evaluation until January 2020. Dr. Al Silberman diagnosed Mother with substance abuse, post-traumatic stress disorder, unspecified personality disorder with antisocial and borderline features, somatization disorder, and major depressive disorder. In addition to drug counseling, Dr. Silberman recommended that Mother "might benefit most from [dialectical behavioral therapy (DBT)] which is more for people with borderline personality issues." DCS referred Mother for DBT in March 2020, but Mother did not begin participating in the therapy until October 2020.

¶9 In February 2020, May 2020, July 2020, January 2021, and April 2021, the juvenile court found that DCS was providing Mother with appropriate services. Mother did not object to these findings and indicated that she liked DBT and found it helpful.

¶10 Nonetheless, Mother did not progress with DBT, and DCS referred her for a second psychological evaluation. Dr. Jennifer Jones evaluated Mother in March 2021. She concluded that Mother suffered from trauma-related symptoms and maladaptive personality characteristics. She opined that Mother needed psychotherapy treatment to "focus on the treatment of maladaptive personality characteristics[,] and did not recommend DBT because it "is contraindicated for individuals with trauma related disorders." DCS followed Dr. Jones's recommendation and referred Mother to non-DBT therapy.

¶11 But Mother continued to struggle. She used marijuana excessively and tested positive for cocaine in June 2021. And, despite ongoing domestic-violence treatment, Mother had a drunken and violent

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altercation with P.M. and J.G.'s father in October 2021 that left Mother unconscious.

¶12 DCS moved for termination. In December 2021, the court held a two-day termination hearing during which the DCS case manager, Dr. Jones, Mother, and the father of P.M. and J.G. testified. The DCS case manager testified about Mother's delay in engaging with therapy, noting that Mother "doesn't trust the therapy process" and withholds important information from her therapist.

¶13 The juvenile court terminated Mother's parental rights, finding DCS proved by clear and convincing evidence the mental illness and fifteen-months out-of-home placement grounds for termination. It also found that termination was in the children's best interests and terminated Mother's rights to E.P. on the additional ground of prior removal. The court found that "Mother has significant untreated mental health issues," has "not been able to demonstrate sobriety during this case," and has not shown an "ability to make safe choices." Further, it found that "Dr. Jones opined persuasively that Mother's mental health issues will continue for a prolonged, indeterminate period of time" and that "Mother's prognosis remains poor, despite the time Mother has been in her new counseling program."

¶14 Mother timely appealed. We have jurisdiction under A.R.S. §§ 8-235(A), 12-120.21(A)(1), -2101(A)(1).

DISCUSSION

¶15 Parents have a fundamental right to the custody and control of their children, but that right is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12 (2000). A juvenile court may terminate parental rights when the State proves a statutory ground for termination under A.R.S. § 8-533 by "clear and convincing evidence." *Id.* at 249, ¶ 12. The court must also find, by a preponderance of the evidence, that severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). Because the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts," *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004), we review a termination order for an abuse of discretion and accept the court's "findings of fact if reasonable evidence and inferences support them," *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3, ¶ 9 (2016).

I. Diligent Efforts.

¶16 Because DCS sought to terminate Mother's parental rights based on mental illness and fifteen-months out-of-home placement, DCS had to make reasonable and diligent efforts to provide Mother with appropriate reunification services. See A.R.S. § 8-533(B)(8) (out-of-home placement ground); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 186, ¶ 1 (App. 1999) (mental-illness ground). Mother argues that the court erred in finding that DCS made such efforts because it initially provided her with DBT therapy – which she asserts was clinically inappropriate – and then provided her insufficient time to benefit from non-DBT therapy.

¶17 DCS contends that Mother waived this argument because she "never objected to the provision of DBT" and never requested "alternative therapy." But Mother's objection to the court's reasonable-efforts finding at the termination hearing preserved the issue on appeal. See *Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 178-79, ¶¶ 14-16 (explaining that a challenge to DCS's efforts to provide services can be raised as late as the termination hearing).

¶18 While Mother's objection at the hearing preserved the issue, her earlier failure to object severely weakens her argument. Mother neither objected to receiving DBT nor to the court's findings at seven different hearings that DCS was making reasonable efforts. Mother even told DCS that she liked and benefitted from DBT. And once DCS learned Mother was not progressing in DBT, it referred her for a second psychological evaluation and non-DBT therapy per Dr. Jones's recommendation. Two years into the dependency, and despite DCS's efforts, Mother continued to expose her children to domestic violence, tested positive for cocaine, and still abused marijuana. The court credited Dr. Jones's testimony that, even with Mother's new counseling program, her prognosis remained poor and her "mental health issues will continue for a prolonged, indeterminate period of time" because her insobriety "undermine[s] any hope for meaningful progress." DCS is not required to "undertake rehabilitative measures that are futile," *Mary Ellen C.*, 193 Ariz. at 192, ¶ 34, and its efforts are not without limits. *Maricopa Cty. Juv. Action No. JS-4283*, 133 Ariz. 598, 601 (App. 1982). Here, ample evidence supports the court's finding that DCS made diligent and reasonable efforts to provide Mother services over the course of the two-and-a-half-year dependency.

¶19 Likewise, we reject Mother's argument that "DCS failed to reasonably accommodate [her] mental illness" under the Americans with Disabilities Act ("ADA"). While DCS must provide a disabled parent with

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reunification services that comply with the ADA, Arizona's statutory requirement that DCS make diligent and reasonable efforts to provide reunification services satisfies the ADA's reasonable accommodation requirement. *Jessica P. v. Dep't of Child Safety*, 251 Ariz. 34, 39, ¶ 15 (App. 2021); *see also Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 256, ¶ 20 (App. 2007) ("[R]easonable efforts' [under A.R.S. § 8-533] includes seeking to reasonably accommodate disabilities from which a parent may suffer."). Because DCS provided reasonably diligent reunification services, it satisfied the ADA.

II. Best-Interests Finding.

¶20 Mother next challenges the juvenile court's best-interests finding. Mother argues the court abused its discretion when it determined that termination was in the children's best interests because "E.P. indicated that she will refuse" to be adopted and the adoption plans separate the siblings.

¶21 When considering a child's best interests, "the child's interest in stability and security must be the court's primary concern." *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 150, ¶ 12 (2018) (cleaned up). "[T]ermination is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* at 150, ¶ 13. One factor favoring termination "is the immediate availability of an adoptive placement." *Audra T. v. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5 (App. 1998). We view "the record in the light most favorable to upholding the court's best-interests finding" and will affirm if reasonable evidence supports it. *Alma S.*, 245 Ariz. at 152, ¶¶ 18, 21.

¶22 The court did not err. While E.P. expressed a preference to remain with Mother, the record does not reflect that E.P. would "refuse" adoption. Moreover, the court acknowledged that E.P. "prefers to remain with her Mother," but found that paternal grandmother plans to adopt E.P., and "she is thriving in her care." Contrary to Mother's argument, the court considered E.P.'s desires but found that they were outweighed by her interest in a "safe home" and "stability," provided by paternal grandmother. *See Alma S.*, 245 Ariz. at 150-51, ¶ 13 (requiring that the court "must consider the totality of the circumstances existing at the time of the severance" when determining a child's best interests).

¶23 Mother also asserts that the juvenile court ignored that "the adoption plans involved separation of [siblings]" and points to the Sibling Information Exchange Program under A.R.S. § 8-543 to argue that her

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children may not have contact with each other. The court's minute entry, however, shows otherwise. When assessing whether termination was in the children's best interests, the court considered that P.M and J.G. "are able to remain together" in their adoptive placement and "[m]aintaining sibling relationships supports a best interests finding." At bottom, while placing siblings together is an important consideration, other factors such as stability, security, health, and safety are paramount. *See Demetrius L.*, 239 Ariz. at 4, ¶ 15; Ariz. R.P. Juv. Ct. 301. The court found that all three children were in adoptive placements that met these needs. Reasonable evidence supports the court's best-interests finding, and we will not reweigh evidence on appeal. *See Alma S.*, 245 Ariz. at 151, ¶ 18. Accordingly, the court did not err.

CONCLUSION

¶24 We affirm the juvenile court's termination order.



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