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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CEDRIC A.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, R.A.,
Appellees.

No. 1 CA-JV 22-0067
FILED 9-29-2022

Appeal from the Superior Court in Maricopa County
No. JD39577
The Honorable Todd F. Lang, Judge

VACATED AND REMANDED

COUNSEL

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By Steven Czop
Counsel for Appellant

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By Emily M. Stokes
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 Cedric A. ("Father") appeals from the juvenile court's order terminating his parental rights. For the following reasons, we vacate the termination order and remand to the juvenile court.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Daisy C. ("Mother") are the biological parents of R.A., who was born in 2020. Mother is also the biological mother of R.V., born in 2018.

¶3 A few months after R.A.'s birth, Mother and Father ended their romantic relationship, and Mother began a relationship with a man named Richard. DCS became involved with the children in June 2020 after Mother and Richard threatened each other with knives in public and in front of the children. During that incident, Mother called Father for help. Father arrived and took custody of both R.A. and R.V. after police arrested Mother. Father returned the children to Mother's care upon her release a short time later.

¶4 Shortly after the incident between Mother and Richard, Father, who was on probation for a prior felony conviction, was arrested for a probation violation related to his failure to return to the halfway house where he had been ordered to live. At the time of his arrest, Father possessed a firearm and was charged, convicted, and sentenced to 2.5 years in prison for misconduct involving weapons. Father had been incarcerated since June 18, 2020, with a projected release date of May 23, 2022. Father will remain on probation following his release.

¶5 DCS filed a dependency petition and the court subsequently adjudicated R.A. dependent as to both parents. R.A. has been living with R.V.'s paternal grandmother since September 2020.

¶6 During the case, Mother reported to DCS that Father had a history of substance abuse related to Percocet. DCS provided Father with

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genetic testing, which enabled him to establish paternity of R.A. It also sent him four service letters encouraging him to participate in services available to him while in custody. For a majority of the dependency, DCS provided Father with biweekly video calls supervised by a case aid, and R.V.'s paternal grandmother facilitated additional phone calls between R.A. and Father. The court ordered DCS to provide additional reading materials to Father in prison. DCS did not provide any reading materials, and Father did not identify or request any specific materials.

¶7 In October 2021, DCS moved to terminate Father's parental rights under the length-of-sentence and fifteen-month time-in-care grounds. The juvenile court held a hearing in February 2022 where Father and the DCS case manager testified. Father testified that he has been sober since December 2019 and is subject to regular drug testing.

¶8 Following the hearing, the court terminated Father's parental rights to R.A., finding that DCS proved the length-of-sentence and fifteen-month time-in-care grounds by clear and convincing evidence and that termination was in R.A.'s best interests by a preponderance of the evidence. Father timely filed a notice of appeal. This court has jurisdiction under A.R.S. §§ 8-235, 12-120.21(A)(1), and 12-2101(A)(1).

DISCUSSION

¶9 Father argues that the juvenile court erred in finding that DCS proved both the length-of-sentence and fifteen-month time-in-care grounds for termination. He also claims the record below was insufficient to support a finding that termination of parental rights was in R.A.'s best interests. We agree.

¶10 Parents possess a fundamental right in 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, 248-49, ¶¶ 11-12 (2000). However, termination of parental rights is not favored and "generally should be considered only as a last resort." *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4 (1990).

¶11 This Court views the evidence and reasonable inferences to be drawn from it in the light most favorable to affirming the juvenile court's order. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7 (App. 2010). We review the juvenile 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. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). But we review de novo "legal issues requiring the

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interpretation and application of § 8-533." *Jessie D. v. Dep't of Child Safety*, 251 Ariz. 574, 580, ¶ 10 (2021) (quoting *Ariz. Dep't of Econ. Sec. v. Rocky J.*, 234 Ariz. 437, 440, ¶ 12 (App. 2014)).

I. Length-of-Sentence Ground.

¶12 Termination is supported under the length-of-sentence ground when "the parent is deprived of civil liberties due to the conviction of a felony . . . [and] the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." A.R.S. § 8-533(B)(4). The language of the statute does not specify exactly what length of time qualifies as a "period of years" and courts have been hesitant to establish a bright line rule. *Michael J.*, 196 Ariz. at 251-52, ¶¶ 28-29.

¶13 Father argues against termination under the length-of-sentence ground because he was anticipating a release in the very near future. The relevant consideration is the total time Father is absent from the family, not just the time remaining in his sentence. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 8 (App. 2002). Still, courts should look to the parent's anticipated release date, which may be earlier than the maximum sentence would suggest. *Rocky J.*, 234 Ariz. at 441, ¶ 16. Father's anticipated release resulted in a sentence of less than two years. While we hesitate to establish a bright line rule, it is worth noting that the statute contemplates "a period of years" rather than "a single year" or "a period of months." See A.R.S. § 8-533(B)(4); see also *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.").

¶14 The statute also requires the court to find that the child has been "deprived of a normal home." A.R.S. § 8-533(B)(4). The Arizona Supreme Court recently ruled that a "'normal home' does not necessarily require the incarcerated parent's physical presence" *Timothy B. v. Dep't of Child Safety*, 252 Ariz. 470, 476, ¶ 24 (2022). When a parent cannot be physically present due to incarceration, "the juvenile court should consider whether another person is willing to be the child's permanent guardian and if the grounds for a permanent guardianship exist." *Id.* at 477, ¶ 27. Notably, the standard does not require another family member—the statutory grounds for permanent guardianship permit the court to "consider *any adult*, including a relative or foster parent, as a permanent guardian." A.R.S. § 8-871(B) (emphasis added).

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¶15 The juvenile court noted that R.A. had bonded with R.V.'s grandmother, she provided a loving home, and she met all of R.A.'s needs. Staying in that placement would also allow R.A. to remain with her brother. In short, the record suggests that the current placement, if willing, would make a suitable permanent guardian for the child. The juvenile court erred in refusing to consider the existing placement for guardianship. *See Timothy B.*, 252 Ariz. at 477, ¶ 28 (instructing the juvenile court to consider a permanent guardianship option on remand); *see also* A.R.S. § 1-601(B) (directing that no state entity shall infringe on the fundamental rights of parenthood if the governmental interest could be served by a less restrictive means); *JS-500274*, 167 Ariz. at 4 (noting general agreement among courts that termination of parental rights "generally should be considered only as a last resort")

¶16 The juvenile court referenced *Timothy B.* in a footnote but determined that guardianship was not appropriate because "Father's efforts were not 'extraordinary and laudable,' Father [did] not have a bond with the child, and placement [was] not related to Father." While these circumstances were present in *Timothy B.*, they were not necessary to the court's ruling. The juvenile court erred in not fully considering the option of a guardianship in this case as part of its determination whether DCS proved the length-of-sentence ground. On remand, the juvenile court should consider: (i) whether a willing permanent guardian is available; (ii) whether the statutory grounds for permanent guardianship exist, including whether guardianship would be in the child's best interests; and (iii) whether Father could contribute to rather than detract from the stable, family environment provided by the permanent guardian. *See Timothy B.*, 252 Ariz. at 477, ¶ 27.

II. Time-in-Care Ground.

¶17 The time-in-care ground supports termination of parental rights when: (i) the child has been in an out-of-home placement for fifteen months or longer; (ii) the parent has been unable to remedy the circumstances that caused the out-of-home placement; and (iii) there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c). In order to pursue termination under this ground, DCS must make diligent efforts to provide appropriate reunification services. *Id.* Although "what constitutes a diligent effort will vary by case," DCS must at least "identify the conditions causing the child's out-of-home placement, provide services that have a reasonable prospect of success to remedy the circumstances *as they arise throughout the time-in-care period*, maintain

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consistent contact with the parent, and make reasonable efforts to assist the parent in areas where compliance proves difficult." *Donald W. v. Dep't of Child Safety*, 247 Ariz. 9, 23, ¶ 50 (App. 2019). In this case, DCS failed to make diligent efforts to provide appropriate reunification services.

¶18 The court noted the allegations of Father's substance abuse as the main circumstance causing out-of-home placement. But DCS did not seek termination based on chronic substance abuse and provided no evidence to rebut Father's claim that he had been sober since December 2019. Nor did DCS provide any evidence that the alleged substance abuse would continue or provide a barrier to reunification upon Father's release from prison. See *Jennifer S. v. Dep't of Child Safety*, 240 Ariz. 282, 287, ¶ 17 (App. 2016) (stating that termination based on substance abuse requires "reasonable grounds" to believe that a parent will not be able to meet his parenting responsibilities "for a prolonged indeterminate period" (quoting A.R.S. § 8-533(B)(3))). Notably, Father claims to have been drug tested regularly throughout the course of the dependency and DCS did not rebut that claim or provide evidence of a positive drug test. See *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 96, ¶ 31 (App. 2009) (noting that DCS's failure to make diligent efforts may prevent DCS from meeting "its burden of proving that termination of a parent's rights is warranted")

¶19 Moreover, the DCS case manager never spoke with Father. Her contact with Father was limited to four form letters encouraging him to participate in any services available to him while incarcerated. This is insufficient to give notice to Father that substance abuse was going to be an issue or to provide him an opportunity to remedy the circumstance as required by the statute. See A.R.S. § 8-533(B)(8)(c).

¶20 The court ordered DCS to provide additional educational reading materials geared towards addressing Father's substance abuse issues. DCS failed to provide any such material. Further, for about two months prior to the termination hearing, DCS did not facilitate any visits between Father and R.A.

¶21 A parent may waive the diligent efforts requirement by failing to adequately raise it. *Shawnee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 177-79, ¶¶ 10-18 (App. 2014). Even so, a parent may adequately raise the issue by disputing diligence "at a termination hearing." *Id.* at 178, ¶ 14. Father timely raised the issue at his termination hearing and made a record of requesting additional services. Absent waiver, the burden is on DCS to prove by clear and convincing evidence that it made a diligent effort to provide the parent with rehabilitative services or that such an effort would

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be futile. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 193, ¶ 42 (App. 1999). DCS fails to make a sufficient effort to reunify a family when it neglects to offer services that the court specifically orders it to provide. *Cf. id.* at 192, ¶ 37 (finding that the State fails to meet its burden "when it neglects to offer the very services that its consulting expert recommends"). When DCS fails to provide court-ordered services, their burden is not discharged merely because Father was not specific enough in his request for additional services. The juvenile court erred in finding that DCS met its diligent efforts burden with respect to Father.

III. Best Interests of the Child.

¶22 The best interests of the child "are a necessary, but not exclusively sufficient, condition for an order of termination." *JS-500274*, 167 Ariz. at 5. Accordingly, courts will conduct a best-interests inquiry only after finding clear-and-convincing evidence supporting one of the statutory grounds for termination. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 149-50, ¶¶ 8, 12 (2018).

¶23 Because our decision today invalidates the statutory grounds for termination, it renders Father's best-interests challenge moot. *Jose M. v. Eleanor J.*, 234 Ariz. 13, 17, ¶ 20 (App. 2014). If, on remand, the juvenile court finds clear and convincing evidence supporting one of the statutory grounds for termination, "it must conduct a renewed best-interests inquiry" focusing on "the totality of the circumstances existing at the time of termination." *Timothy B.*, 252 Ariz. at 478-79, ¶¶ 31, 34.

CONCLUSION

¶24 For the above-stated reasons, we vacate the juvenile court's order and remand for further proceedings consistent with this decision.



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