DIVISION ONE
FILED: 06-10-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CYNTHIA M.,	)	1 CA-JV 09-0184
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, SAMANTHA M., CARLEE M.,	)	Not for Publication – (Ariz. R.P. Juv. Ct. 103(G); ARCAP 28)
	)	
	)	
	)	
Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD 16286

The Honorable Crane McClennen, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Carol A. Salvati, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

The Law Office of Lisa M. Timmes
by Lisa M. Timmes — Scottsdale
Attorney for Appellant

W E I S B E R G, Judge

¶1 Cynthia M. ("Mother") appeals from the superior court's order severing her parental rights on the ground that

two of her children had been in out-of-home care for more than fifteen months. Mother argues that the court abused its discretion in making the required factual findings. For reasons that follow, we affirm.

BACKGROUND

¶2 S. was born in March 2005, and C. was born in December 2007. Both had been born exposed to methamphetamine. The Arizona Department of Economic Security ("ADES") filed a dependency petition shortly after C.'s birth, and an initial dependency hearing took place on December 31, 2007.

¶3 In February 2008, ADES arranged for the children to be placed with J. and T.S., Mother's half-sister and her husband. The court approved the change in custody.

¶4 In May 2008, the court found that the children were dependent as to Mother; the case plan was family reunification. Services offered to Mother were: substance abuse assessment and treatment, random urinalysis ("UA") testing, a psychological evaluation, parent aide services, supervised visitation, and transportation.

¶5 In a permanency planning hearing in April 2009, the court ordered that the case plan be changed to severance and adoption. In May, ADES filed a motion to sever Mother's parental rights. It alleged that the children had been in an

out-of-home placement for fifteen months or more, that Mother had been unable to remedy the circumstances that had caused the placement, and that it was substantially likely that Mother would be incapable of exercising proper and effective parental control in the near future. Specifically, ADES stated that Mother had relapsed into drug use in February and March 2009; the maternal aunt and uncle were committed to adopting the children; and termination would be in the children's best interests.

¶6 A contested severance hearing occurred on September 18 and 25, 2009. The court concluded that ADES has shown by clear and convincing evidence that the children had been out-of-home for more than fifteen months, that Mother had not remedied the circumstances that had caused the placement, and that a substantial likelihood existed that she would be incapable of exercising effective parental care in the near future. The court noted that Mother had used methamphetamine for almost fifteen years, had a criminal conviction in 2000 for possession of drug paraphernalia, and that both children had been born drug-exposed. In addition, although Mother had sought her own drug treatment through NOVA and completed treatment in 2008, she had tested positive for methamphetamine use in February and March 2009, "showing that the NOVA program did not remedy her drug problem."

Furthermore, Mother had not always either submitted to drug testing when asked or called to ask about testing. Thus, the court found it unlikely she would be capable of effective parental care and control in the near future. Finally, the court found by a preponderance and clear and convincing evidence that severance would be in the children's best interests.

¶7 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235 (2007) and 12-2101 (B) (2003).

DISCUSSION

¶8 Before ordering severance of parental rights, the superior court must find clear and convincing evidence of at least one of the statutory grounds listed in A.R.S. § 8-533(B) (2007). *Michael J. v. ADES*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court also must find by a preponderance of the evidence that severance is in each child's best interest. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). On appeal, we defer to the superior court's factual findings unless we determine that they are clearly erroneous, i.e., are unsupported by reasonable evidence. *Minh T. v. ADES*, 202 Ariz. 76, 78-79, ¶ 9, 41 P.3d 614, 616-17 (App. 2001). As grounds for severance, ADES cited A.R.S. § 8-533(B)(8)(b), which allows severance if a child has been "in an

out-of-home placement for a cumulative total period of fifteen months . . . [and] the parent has been unable to remedy the circumstances which cause the child to be in out-of-home placement and 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."

¶9 Mother first argues that no reasonable evidence supported findings that she had been unable to remedy the cause of the children's removal, i.e., her drug use, and that she would unlikely be able to parent in the near future. She cites negative UA tests in April through September 2009; evidence of her employment for a full year, stable housing, and a vehicle; and statements from her substance abuse counselor and sponsor that between March and September 2009, Mother had been active in counseling and support group meetings and was motivated to maintain sobriety.

¶10 Nevertheless, Mother's sponsor/counselor testified that one can stop active drug use but is not "cured" and that there was no guarantee that a period of sobriety would last "because behaviors . . . don't necessarily change just because you're not using." Furthermore, CPS case worker Kelly Hummitzsch testified that Mother had been required to submit to random UA testing two or three times a week and that because she

had chosen NOVA for her drug treatment, NOVA did not test its clients for drug use unlike other programs. Thus, during her treatment in 2008, Mother had not submitted a single UA from March through December.

¶11 Mother did begin UA testing in January 2009 but missed seven tests in January, four in February, six in March, four in April, seven in May, five in June, and four in July. She tested positive for amphetamines twice in February and once in March and tested positive for alcohol in June. She did not test at all between July 8, 2009 and the first hearing date of September 18. In the week between court dates, she did not call her case worker as required but drug tested on two occasions. Thus, her compliance with testing had been "very minimal." Mother also testified that her support network consisted solely of her substance abuse counselor/sponsor, with whom she had worked for the prior six months.

¶12 Hummitzsch stated that before returning young children to a parent, the only evidence that would establish the parent's sobriety with certainty was nine to twelve months of consistent UA compliance and uniformly negative test results. Mother conceded that she had tested sporadically in 2009 despite knowing that she was to call every weekday to learn whether that was a test day. The superior court properly considered Mother's

inability to follow through with telephoning and testing in determining whether she had remedied the circumstances that had caused the placement and would be able to effectively parent in the near future.

¶13 Mother also asserts that even if she had not completely remedied the circumstances, there was no reasonable evidence that she would not be able to effectively parent in the near future. She cites a statement in the psychologist's evaluation that Mother could discharge her parental duties after evidence of six to twelve months of sobriety. Yet even in the week between the two hearings, Mother did not consistently call to ask about testing, and thus did not use a readily available mechanism to show her commitment to abstinence.

¶14 After asserting that she had fully demonstrated her compliance with all requirements to regain the children, Mother argues alternatively that CPS failed to diligently "provide appropriate reunification services" required by A.R.S. § 8-533(B)(8). She contends that CPS failed to arrange for counseling with a doctorate-trained psychologist and a self-help group as the psychological evaluation recommended. CPS informed Mother, however, that she first had to seek counseling through AHCCCS and Magellan, and if denied services, CPS then could arrange the counseling. Mother told the caseworker that she had

an intake scheduled but never provided either records of treatment or proof of denial of services. Mother bears some responsibility for failing to follow through in order to obtain additional counseling but said that she never felt the need for any. Mother did complete the NOVA program in 2008 and for six months in 2009 had attended a support group and received weekly counseling from her sponsor, who had a master's degree and two years of training in substance abuse. Mother has not shown, however, how lack of treatment by a doctorate-trained counselor undermines the court's findings.

¶15 Mother also argues that by the time of trial, she had abstained from drug use for approximately six months, which the psychologist had opined was the minimal time before CPS could return the children, and thus that Mother "was well on her way to demonstrating sobriety" for the desired time period. But as noted, in nine months in 2009, Mother often failed to submit to testing that would have demonstrated her sobriety. Further, the court could not assume that Mother had abstained because the testing that had been done indicated several relapses.

¶16 Mother next argues that CPS was very slow to arrange a psychological evaluation after the service plan was adopted in February 2008 and failed to implement treatment for depression and other issues that would have helped to prevent her relapse

in 2009 and to address her reluctance to submit to drug testing. Mother failed to attend a psychological evaluation that had been set for May 2008, and CPS had to re-arrange a referral, which it did in October. The evaluation took place in January. Thus, Mother's own conduct contributed to the delay in arranging an evaluation. If ADES has provided "time and opportunity to participate in programs designed to help her become an effective parent," *Matter of Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994), it has complied with the statute. ADES does not have to "ensure that a parent participates in each service it offers." *Id*.

¶17 Next, Mother argues that insufficient evidence supports the finding that severance was in the children's best interests. Severance may be in a child's best interests if the child will benefit from termination or would be harmed by continuing the parental relationship. *James S. v. ADES*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998). In *James S.*, we noted that "[e]vidence of an existing adoption plan can be considered a benefit to the child," although such plan is not necessary. *Id*.

¶18 Mother cites testimony that her parenting skills were adequate and that she was affectionate with the children and that S. in particular returned her affection. This evidence

alone does not negate a finding that severance was in the children's best interests. The case worker testified that the children had done very well while living with their aunt and considered her "their caregiver" and "mother," that the aunt had met all of the children's needs for nearly eighteen months, and that the aunt was willing to adopt both girls. The case worker opined that severance and adoption was in the children's best interests because they needed permanency and had been placed with a relative who had provided "wonderful care." She also opined that Mother would not be able to parent in the near future because of the duration of her drug use, the fact that both girls had been exposed in *utero*, and that in twenty-two months, Mother had not been able to show that she could remain sober.

¶19 We have held that the court may properly consider "the immediate availability of an adoptive placement . . . [or] whether an existing placement is meeting the needs of the child. *Audra T. v. ADES*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998); J*ames S.*, 193 Ariz. at 356, ¶ 19, 972 at 689 (placing child with half-sibling as well as permanency of adoption served child's best interest). Reasonable evidence supported the court's findings on this issue.

CONCLUSION

¶20 We cannot say that the superior court's findings were clearly erroneous or that it abused its discretion in ordering severance under these circumstances. Accordingly, we affirm the order.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
JON W. THOMPSON, Judge