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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALYSSA M. ,) 1 CA-JV 09-0205
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz.R.P. Juv. Ct.;
SECURITY, JOSEPH M., AVA M.,) Rule 28 ARCAP)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD15583

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Terry Goddard, Attorney General Mesa
By Amanda L. Holguin Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Lisa M. Timmes Scottsdale
Attorney for Appellant

O R O Z C O, Judge

¶1 Alyssa M. (Mother) appeals the juvenile court's order terminating her parent-child relationship with J.M. and A.M. (collectively, the Children) based on negligence or failure to

protect the Children from abuse. See Ariz. Rev. Stat. (A.R.S.) § 8-533.B.2 (Supp. 2009).¹ Mother argues that the court erred in terminating her parental rights and contests its findings that termination was in the Children's best interests. For the reasons that follow, we affirm the judgment of the juvenile court.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to affirming the decision of the juvenile court. *In re Maricopa County, Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994). To the extent a conflict existed in the evidence presented, it was for the juvenile court to resolve. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12, 53 P.3d 203, 207 (App. 2002).

¶3 Mother is the biological mother of six children, only two of which are in her care.² In March 2007, ADES received a report that the Children were left alone in the apartment of Rose and Rocky M. (Grandfather), the Children's maternal grandparents.

¹ Father's rights were also terminated; however, he is not a party to this appeal.

² Mother's oldest child lives with her father. J.M., born in 2003, and A.M., born in 2006, were subject to ADES's motion to terminate the parent-child relationship. J.B.M. was born in 2007, during the pendency of these proceedings and Mother consented to her adoption. Mother gave birth to twins during the pendency of this matter, who were in her custody at the time of these proceedings.

The report indicated the room was "littered with drug paraphernalia, dirty clothing, trash, broken glass and various other debris." Neither Mother nor the maternal grandparents were located, and the Children were taken into custody.

¶4 On March 8, 2007, ADES filed a dependency petition, alleging the Children were dependent as to Mother because she was abusing illegal substances and had abandoned and neglected the Children. The Children were found dependent as to Mother. A case plan of family reunification was developed, and ADES offered parent aide services, substance abuse assessment with treatment, a psychological evaluation, and random urinalysis testing with transportation. Mother did not participate in the majority of offered services for nearly fifteen months.

¶5 At a Foster Care Review Board (FCRB) meeting held on October 2, 2008, the Children's foster mother, P.R., disclosed that J.M. told her about being sexually abused by Grandfather. Mother was present at the FCRB meeting and admitted hearing P.R.'s disclosure. P.R. indicated J.M. had told her about the alleged sexual abuse in March or April of 2007, and ADES instructed her to report the allegations of abuse to police. P.R. failed to report the incident to the police, and ADES made a referral, but it conceded it did not follow up on the allegations of J.M.'s abuse. The case manager indicated that following the FCRB meeting, and in light of J.M.'s allegations of sexual abuse,

she told Mother that Grandfather could not be around the Children. The case manager also indicated she told Mother on two other separate occasions that Grandfather could not be around the Children. Mother denies the case manager informed her that Grandfather could not be around the Children.

¶16 Mother had her first overnight unsupervised visit with the Children the weekend of December 5, 2008. Some of Mother's family, including Grandfather, visited Mother's apartment on December 7, 2008. Mother indicated the family's visit was a "surprise" and her parents came "uninvited." Despite J.M.'s prior disclosure of sexual abuse and the case manager's alleged warnings, Mother did not ask Grandfather to leave her apartment.

¶17 On December 8, 2008, after acting out sexually at his preschool, J.M. disclosed to his teacher and P.R. that he was touched inappropriately by Grandfather during his weekend visit to Mother's home. J.M. indicated that Mother had allowed him to leave the apartment alone with Grandfather. In a police report of the incident, Mother "recalled [Grandfather] needing to leave the apartment for about 5 minutes to take out the garbage and thinks [J.M.] could have gone with [Grandfather]."³ Mother also reported that she did not believe what P.R. had said about J.M.'s allegations of sexual abuse against Grandfather at the October 2,

³ Although the police report uses all capital letters, we have modified quotations from those reports to reflect upper and lowercase text.

2008 FCRB meeting because she thought P.R. was "a strange person." Mother stated, however, that "in matters of importance, J.M. would not lie or make up stories." Grandfather was also interviewed by police about the December 7, 2008 incident. Grandfather stated that he did take J.M. from the apartment to a liquor store where he bought alcohol and candy bars, but that they were only gone for approximately ten minutes. Grandfather denied the allegations of sexual abuse.

¶18 W.D., a forensic interviewer, conducted an investigative interview with J.M. on December 9, 2008. During the interview, J.M. disclosed that while he was at Mother's house, Grandfather took him outside and "wanted to suck on his genital area." J.M. disclosed that he did not want to leave with Grandfather, but Grandfather "was going to get him candy." W.D. indicated that J.M. had provided a "narrative account" that was "quite descriptive." W.D. stated that while it is not her job to determine whether the child is telling the truth, given her professional experience, J.M. did not show signs of coaching.

¶19 Due to the December 7, 2008 incident, ADES filed a motion for termination of the parent-child relationship between Mother and the Children pursuant to A.R.S. § 8-533.B.2 on the grounds of willful abuse or failure to protect from abuse. ADES's motion further alleged that the termination of Mother's parental rights was in the Children's best interests. On March

18, 2009, the case plan was changed from family reunification to severance and adoption.

¶10 On August 20 and September 2, 2009, the juvenile court held a contested hearing on the severance motion. Mother testified that during her family's visit, she did not know that J.M. had left the apartment with Grandfather. Mother testified that a responsible parent would not allow her child to be left "unattended with someone who they know there have been sexual abuse allegations against." Mother testified that allowing a child to be alone with someone who is an alleged sexual predator would be putting the child at risk. Mother stated that she believed that "something" had happened to J.M., but said that she did not believe Grandfather abused J.M. Mother testified that J.M. had not told her about the alleged sexual abuse on December 7; she learned of it for the first time when interviewed by the police. Mother testified that during this interview, she learned that J.M. had also made allegations that one of his foster brothers had inappropriately touched him.⁴

¶11 After taking the matter under advisement, the court granted the motion to terminate Mother's parental rights. The juvenile court found that grounds for severance existed pursuant

⁴ On December 9, 2008, a police report regarding the December 7, 2008 alleged incident of sexual abuse by Grandfather was made. Because J.M. made additional allegations of sexual abuse by one of his foster brothers, J.M. and A.M. were both removed from that placement on December 10, 2008.

to A.R.S. § 8-533.B.2 because there was clear and convincing evidence that Mother "failed to protect/has abused her children."

¶12 The juvenile court also found by a preponderance of the evidence that termination would be in the Children's best interests. On November 12, 2009, the court filed a signed order which terminated Mother's parental rights to the Children.

¶13 Mother filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 8-235.A (2007), 12-120.21.A, - 2101.B (2003) and Rule 103.A of the Arizona Rules of Procedure for the Juvenile Court.

DISCUSSION

¶14 The right to custody of one's children is fundamental, but is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). In Arizona, to justify the termination of parental rights, a juvenile court must find, by clear and convincing evidence the existence of at least one statutory basis for termination pursuant to A.R.S. § 8-533. *Id.* at ¶ 12. The court must also find by a preponderance of the evidence that the termination is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶15 In reviewing a severance order, we view the evidence in the light most favorable to sustaining the order. See *In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. at 106, 876

P.2d at 1141. “[T]he 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 County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). Accordingly, we do not reweigh the evidence but determine only whether there is evidence to sustain the juvenile court’s ruling. *In re Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996). “[W]e will affirm a severance order unless it is clearly erroneous,” and “we will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings.” *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205.

I. Severance pursuant to A.R.S. § 8-533.B.2

A. No requirement for new reunification services

¶16 Relying on this Court’s decision in *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), Mother argues that ADES was required to make reasonable efforts to preserve the family and also provide her with new reunification services after the December 2008 incident and failed to do so.

¶17 In *Mary Ellen C.*, the mother’s rights were terminated based on mental illness pursuant to A.R.S. § 8-533.B.3. 193 Ariz. at 190, ¶ 22, 971 P.2d at 1051. This Court reasoned A.R.S. § 8-533.B.3 contained “a statutory requirement that implicitly

incorporates the obligation to make reasonable efforts to preserve the family before seeking a severance on mental illness grounds." *Id.* at 191, ¶ 31, 971 P.2d at 1052. Quoting, in part, A.R.S. § 8-533.B.3, we stated "the statute permits a severance only if the illness renders the parent 'unable to discharge the parental responsibilities . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.'" *Id.* We found it "inherent within this requirement that the condition be proven not to be amenable to rehabilitative services that could restore a mentally ill parent's ability to care for a child within a reasonable time." *Id.* Similar reasoning was adopted in *Mary Lou C. v. Arizona Department of Economic Security*, where the mother's rights were terminated based on chronic substance abuse pursuant to A.R.S. § 8-533.B.3. 207 Ariz. 43, 49, ¶¶ 14-15, 83 P.3d 43, 49 (App. 2004) (concluding that ADES was obligated to prove by clear and convincing evidence that it had made a reasonable effort to provide the mother with rehabilitative services or that such efforts would be futile).

¶18 Interpretation of a statute is a legal question that we review de novo. *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, ___, ¶ 16, 224 P.3d 950, 953-54 (App. 2010). When interpreting a statute, our primary goal is to give effect to the

legislature's intent with the statute's plain language being the best reflection of that intent. *Id.*

¶19 Severance based on neglect or abuse pursuant to A.R.S. § 8-533.B.2 is more analogous to termination based on abandonment pursuant to A.R.S. § 8-533.B.1 rather than termination pursuant to mental illness or chronic drug abuse pursuant to A.R.S. § 8-533.B.3. We have held that there is no statutory requirement, express or implied, that a court must find that ADES has diligently provided a parent with reunification services when termination of a parent's rights is based on abandonment. See *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 64-65, ¶¶ 9-11, 993 P.2d 462, 465-66 (App. 1999).

¶20 Similar to subsection B.1, subsection B.2 contains no requirement that ADES must diligently provide reunification services before a juvenile court may terminate a parent's rights. A.R.S. § 8-533.B. Section 8-533.D provides that when "considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification services to the parent and the participation of the parent in these services." If the legislature wanted to include the requirement for reunification services into subsection B.2, or any other subsection, it could have done so. See *In re Martin M.*, 223 Ariz. 244, ___, ¶ 8, 221 P.3d 1058, 1060 (App. 2009); see also *Champlin v. Sargeant*, 192

Ariz. 371, ¶ 16, 965 P.2d 763, 766 (1998) (applying the doctrine of *expressio unius est exclusion alterius*, which means expression of one thing implies the exclusion of another). Although evidence about services offered to a parent and the parent's participation may be relevant in determining whether the severance is in the child's best interests, it is not required by A.R.S. § 8-533.B.2.

B. Sufficient evidence for severance

¶21 Pursuant to A.R.S. § 8-533.B.2, the juvenile court may terminate the parent-child relationship if "the parent has neglected or willfully abused a child. This 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."

¶22 In its minute entry order terminating Mother's parental rights as to the Children, the juvenile court found that ADES had proven by clear and convincing evidence that Mother failed to protect and/or abused her children. See A.R.S. § 8-533.B.2. Specifically, the court found:

With knowledge of the allegations of the past sexual abuse of [J.M.] by [Grandfather], and while still subject to the jurisdiction of the court at a time when she was supported by a family reunification team, mother allowed [J.M.] to be in a small apartment with [Grandfather]. While there, mother either allowed [J.M.] to be taken by [Grandfather] or had her attention diverted such that she did not realize that [Grandfather] left the apartment with [J.M.] for a

significant period of time, during which [J.M.] stated he was abused.

. . . .

Moreover, the court finds that mother failed to protect her children regardless of whether [ADES] told mother that her children should not have contact with [Grandfather]. By December 2008, mother knew of the allegations and should have (and, indeed, appeared to admit that she should have) used better judgment in deciding who would be around her children so that she could protect her children. Mother, however, failed to do so and the evidence at trial still suggests that mother does not believe that [Grandfather] abused her son.

¶23 We conclude that sufficient evidence supports the juvenile court's findings. In this case, there is no dispute that Mother began engaging in services after fifteen months of non-participation. Despite Mother's participation in services and her sobriety, however, Mother neglected or willfully refused to protect the Children by allowing Grandfather to have contact with the Children after she was aware of allegations of sexual abuse. The court specifically found that A.R.S. § 8-533.B.2 "was met by mother allowing [Grandfather] to have contact with [J.M.], notwithstanding her knowledge of the prior abuse."

¶24 At the severance hearing, Mother testified that she believed that J.M. was sexually abused, but did not believe that he was sexually abused by Grandfather. Mother testified that she knew her father had left the apartment for a period of time on December 7, but she did not know that J.M. had gone with him.

Mother agreed, however, that a responsible parent would not allow J.M. to be alone with Grandfather. ADES requested that Mother obtain an order of protection against Grandfather, which Mother testified she tried to do in March 2009, over three months after the December incident. Mother testified the order of protection was not granted because the court told her that ADES needed to complete its investigation as to Grandfather.

¶25 Dr. B. conducted Mother's psychological evaluation in October 2008, approximately two months prior to the December 7 incident, when Mother was admittedly sober.⁵ Dr. B. found there was "evidence of impulsivity and irresponsibility as well as disregard for her own or others' safety." Additionally, Dr. B. noted that Mother "has needed others to assume responsibility for major areas of her life and has had problems with making decisions that are in her own or her children's best interests." Dr. B. added "that caring for [the Children] would be beyond her capabilities at this time without a risk of relapse."

¶26 Mother argues the juvenile court's decision, with respect to A.M., should be reversed because "[A.M.] never made any disclosures against [Grandfather] and there was no evidence

⁵ Dr. B., Ph.D., is a clinical psychologist who performed Mother's psychological evaluation in October 2008. Despite Mother's assertion in her opening brief that the "psychological evaluation was not admitted into evidence," the report of her evaluation was indeed admitted into evidence and was also discussed in the juvenile court's ruling.

that [A.M.] specifically was ever at risk in [Grandfather's] presence." The court found that "[a]llthough [J.M.] has been [Grandfather's] primary target, the failure to protect concerns regarding mother apply with equal force to [A.M.]." Quoting *Linda V. v. Arizona Department of Economic Security*, 211 Ariz. 76, 79, ¶ 14, 117 P.3d 795, 798 (App. 2005), the court stated that those parents "who permit another person to abuse or neglect their children, can have their parental rights to their other children terminated even though there is no evidence that the other children were abused or neglected." Because there was sufficient evidence that Mother failed to protect or had abused J.M. pursuant to A.R.S. § 8-533.B.2, the juvenile court did not err by also severing Mother's parental rights to A.M.

¶27 Based on the above mentioned evidence, we conclude that sufficient evidence supports the juvenile court's finding that Mother failed to protect or had abused the Children pursuant to A.R.S. § 8-533.B.2.

II. Best interests

¶28 Mother also challenges the juvenile court's finding that termination of her parental rights was in the Children's best interests. See A.R.S. § 8-533.B (requiring the juvenile court to "consider the best interests of the child").

¶29 To support a finding that termination is in a child's best interests, the petitioner must prove that the child will

affirmatively benefit from the termination. *In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990). In making the determination, the juvenile court may consider evidence that the child is adoptable or that an existing placement is meeting the needs of the child. *Mary Lou C.*, 207 Ariz. at 50, ¶ 19, 83 P.3d at 50.

¶30 In this case, reasonable evidence supports the juvenile court's finding that termination of Mother's parental rights was in the Children's best interests. At the time of the severance hearing, the Children had been in foster care for more than two years and were currently in a licensed, adoptive foster home. The foster parents were willing to adopt the Children and the placement was considered permanent. The case manager opined that the foster parents provided a stable, safe and appropriate environment for the Children and they were able to meet all of the Children's needs. The case manager stated that the Children were "doing well with their current foster parents."

¶31 At the contested severance hearing, the case manager testified that severance and adoption was in the Children's best interests because they would "benefit from permanency, stability, close relationship[s], [and a] nurturing home environment." The case manager also testified that severance and adoption was in the best interests of the Children because Mother was not able to protect them. Based on all the testimony and evidence presented,

the juvenile court did not err in finding that ADES had "proven by a preponderance of the evidence that termination of parental rights would be in the best interest of the [C]hildren."

CONCLUSION

¶132 For the reasons previously stated, we affirm the juvenile court's termination of Mother's parental rights as to the Children.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DANIEL A. BARKER, Judge

/S/

LAWRENCE F. WINTHROP, Judge