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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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RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KIMBERLY L. and BRIAN S.,) No. 1 CA-JV 10-0063
)
Appellants,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF SECURITY,) (Not for Publication -
NOAH S.,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD14601

The Honorable Roger E. Brodman, Judge

AFFIRMED

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T I M M E R, Chief Judge

¶1 Kimberly L. ("Mother") and Brian S. ("Father")
(collectively "the parents") appeal the juvenile court's order

terminating their parental rights to two-year-old Noah S. pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(11) (2009).

¶2 Section 8-533(B)(11) provides as follows:

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

. . . .

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

The evidence reflects, and the parents do not contest, that within eighteen months after Noah was returned to the parents' custody following court-ordered removal to an out-of-home placement, Noah was returned to that placement pursuant to court order. Further, the parents do not challenge the court's

finding that termination was in Noah's best interests. Rather, the parents contend the court erred by terminating the parent-child relationship because the evidence does not show they were unable to discharge their parental responsibilities. Father additionally argues that termination was unwarranted because the Arizona Department of Economic Security ("ADES") did not make diligent efforts to reunite him with Noah.

¶3 The juvenile court may terminate the parent-child relationship only upon finding that clear and convincing evidence demonstrates at least one statutory ground for severance and that a preponderance of the evidence shows severance is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We will affirm the judgment unless the juvenile court abused its discretion by making "factual findings [that] are clearly erroneous[;] that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted). Because the juvenile court is in the best position to assess witness credibility and weigh the evidence, the focus of our inquiry is

whether sufficient evidence exists to support the court's ruling. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004) (quoting *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987)).

¶4 Our review of the record reveals sufficient support for the juvenile court's findings that the parents are unable to discharge their parental responsibilities due to Mother's mental health issues, Father's drug and alcohol abuse, domestic violence issues, both parents' inability to consistently attend court hearings and comply with required services to regain custody of Noah, and the parents' extended periods of lethargy and disinterest in parenting Noah.¹

¶5 A.M., a case manager for Child Protective Services ("CPS"), testified at the termination hearing held in February 2010 that Noah came into the care of ADES in June 2009 for the second time because Mother was acting erratically and not taking her medications for bipolar disorder. Mother had also "presented in a very hostile way. [A] case manager[] went out to the [parents'] home to try to speak with them, and [Mother]

¹ We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

was screaming and became very irate and she . . . would not communicate with the case manager." A.M. also testified that the previous case manager had "attempted to go out to the home to talk to [the parents] several times and stated that [the parents] wouldn't answer the door and wouldn't return phone calls." A.M. stated that her concerns regarding the parents' ability to parent Noah included "the domestic violence issues and . . . [Mother's] mental health issues . . . remaining on her medication[s] and being consistent with her treatment" and Father's unresolved drug issues.

¶6 A.M. additionally testified that Father had "failed to address his anger management issues as evidenced by his participation in the conflict with a parent aide on November 10, 2008, by blocking the door of his residence and preventing the parent aide from leaving." Despite Father's self-reporting that he has been in remission from illegal drug use, "there have been allegations that he has been using." A.M. pointed out the court had found in April 2009 in connection with the termination proceeding concerning another child that Father failed to complete "a recommended substance abuse prevention aftercare program, failed to demonstrate that he was abstaining from illegal drug use, only had partial completion of domestic violence counseling, and had not alleviated the concern that he

and [M]other continued to engage in violent behaviors toward each other[.]”

¶7 The parents’ participation in court proceedings and remediation services was sporadic, further supporting a finding that if they could not function appropriately to regain custody of Noah, they were not able to carry out their parental responsibilities. After Noah was removed from their custody for a second time in June 2009, the parents failed to attend the preliminary protective hearing and initial dependency hearing held that month and the continued initial dependency hearing/publication hearing held in August. The court found there was no good cause for the parents’ failure to appear at the continued hearing and approved the case plan of severance and adoption in their absence. The parents did not contact CPS until October, four months after Noah was removed from their home.

¶8 The parents attended mediation in November and agreed to participate in services. They were offered various services, such as substance-abuse assessment, urinalysis testing, a psychological consultation, and transportation. Mother was required to provide twelve urinalysis tests between November 2009 and January 2010 but failed to provide any samples. Father was required to submit thirteen tests during that same time period and also failed to provide any samples. The parents

failed to attend a scheduled psychological consultation in November 2009 and, as of February 2010, had not obtained the consultation. Because a psychological consultation was deemed necessary before the parents were allowed to visit Noah, they effectively elected not to visit Noah in the eight months between the time he was removed from their home and the termination hearing in February 2010. Finally, the parents missed their initial substance-abuse assessment in December, although they attended the assessment at the rescheduled appointment in January 2010.

¶19 Although the parents failed to obtain a psychological consultation, they had been previously examined by two doctors between 2006 and 2008.² G. Joseph Bluth, who holds a Ph.D in clinical psychology, evaluated Mother in May 2006. Dr. Bluth concluded that Mother showed evidence of bipolar disorder and a panic disorder and she admitted she could not "perform the most basic parenting tasks." Dr. Bluth found that Mother "has depression/agitation, anxiety and manic symptoms which would affect her ability to focus on her child's needs. She also has dependent traits and could have trouble stabilizing or she could associate with an individual who might be abusive to the

² The parents were evaluated in connection with proceedings that resulted in the termination of their parental rights to another son, Brian. The propriety of that termination judgment is not before us in this appeal.

children." Dr. Bluth was also concerned about the risk to Noah, stating that "[t]he primary risk would be one of neglect related to her bipolar illness and panic disorder."

¶10 Richard J. Rosengard, D.O., evaluated Mother in January 2008. Dr. Rosengard concluded that Mother

has a bipolar disorder, which means that, certainly, without treatment and even with treatment, there is the potential for fluctuations in her mood that would not allow her to appropriately parent her child. With medications she appears, though, to be stable. She also has been having an ongoing relationship with [Father] who apparently has been abusive to her to the point that he was charged three times with domestic violence. . . . Both of these conditions can increase the likelihood that she could not appropriately care for herself and, therefore, would have more difficulty in caring for anybody else that she would be responsible to care for.

¶11 Father was examined by Dr. Bluth in May 2006, and Joel E. Parker, M.D., in July 2007. Father admitted to Dr. Bluth that he was a "bad alcoholic and drug addict for twenty-four years" and began using drugs, which included marijuana, methamphetamines, heroin, cocaine, and PCP, at the age of seven. He stated that he last used drugs in February 2005 and consumed alcohol on a daily basis until November 2005, when he stopped drinking altogether. Father also admitted being arrested on three separate domestic-violence charges, which resulted in at least one felony conviction and three and one-half months' incarceration. Dr. Bluth concluded that the personality assessment conducted on Father indicated the presence of an

antisocial personality disorder and a mood disorder. Dr. Bluth also found evidence of polysubstance dependence, which was purportedly in remission, and "evidence of irritability and aggressiveness, consistent irresponsibility, impulsivity, disregard for the safety of himself and others, and a lack of remorse." Dr. Bluth stated that Father had arrests related to his drug use and that "[t]he primary risk [to Noah] would be one of neglect related to a possible relapse into drug use. [Father] has also had arrests on domestic violence charges which suggest the possibility of acting out aggressively toward a child in his care."

¶12 During Dr. Parker's examination of Father, Father admitted he began drinking alcohol at the age of five and used the previously described drugs as well as LSD, ecstasy, and mushrooms. Dr. Parker concluded that Father had a childhood conduct disorder and "will be at great risk for relapsing with substances throughout his lifetime." Dr. Parker also opined that Father

has been somewhat antisocial in the past, with numerous arrests as a child, and a history of aggression, typically when intoxicated. He has been partially compliant with CPS required services. His greatest liabilities to being a minimally adequate parent are his significant dependence on his wife, despite her reported psychiatric instability, and his history of abusing substances.

¶13 In January 2008, Dr. Parker provided an updated opinion of Father based upon his review of additional documents. Dr. Parker opined that Father "likely has some level of denial about his wife's stability, which could significantly affect his ability to safely parent his children." Dr. Parker also stated that Noah "would be at risk for neglect or physical abuse if [Father] were to relapse to substance use or leave [Noah] in the care of [Mother] while she was mentally unstable." Because neither Father nor Mother participated in the evaluation scheduled in November 2009, and because the parents failed to reschedule the evaluations before the termination hearing, there has not been a recent evaluation conducted on the parents.

¶14 Father testified he and Mother had moved three times in the past six months, he was unemployed, and had been receiving unemployment benefits for approximately one year. Father admitted that based on the state assistance he received monthly, he could "absolutely not" provide for Noah and that lack of transportation is "absolutely" a problem for him and Mother. Father further testified that Mother was unable to work due to her psychiatric condition. Father stated that when Mother is not on her medications it will often cause "distress within the family" and that since Noah was removed from their home, Mother has not been compliant with taking her medications "a couple of times."

¶15 Mother admitted at the termination hearing that "[t]here was probably a time or two" she was noncompliant with her medications when Noah was living with her, and that when she does not take her medications she has "difficulty with [her] emotions, [her] stability." Mother also testified that although she was aware she had the right to contest Noah's removal from her custody in June 2009, she failed to do so. Mother additionally admitted to a history of domestic violence in her relationship with Father. Finally, Mother stated she failed to participate in the ADES services due to a lack of transportation.

¶16 Despite Father's and Mother's allegations that they contacted CPS on multiple occasions between June and October 2009 and did not receive any response, A.M. testified she only had received two telephone messages from the parents and returned both messages. A.M. further rebutted the parents' claims they experienced transportation problems and therefore did comply with services. A.M. testified that CPS could arrange for transportation when requested and that various private providers contracting with ADES, such as TERROS and Magellan, offered bus passes when requested and did so on at least one occasion in this case when the parents made such a request.

¶17 The above-recited evidence sufficiently supports a conclusion that the parents were prevented from discharging

their parental responsibilities due to unstable living and financial situations, unstable employment, domestic violence, Father's prolonged history of drug and alcohol abuse, Mother's sporadic compliance with essential psychiatric medications, and both parents' noncompliance with services offered by ADES and lack of interest in gaining visitation rights to Noah. Consequently, the juvenile court did not err in its findings to this effect.

¶18 Father additionally argues the juvenile court erred by terminating his parental rights to Noah because insufficient evidence exists that ADES expended diligent efforts to reunite Father with Noah. A.R.S. § 8-533(B)(11)(b). The State was required to demonstrate that ADES made reasonable efforts to preserve the family. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93, ¶ 19, 219 P.3d 296, 303 (App. 2009). Although not required to provide "every conceivable service" or "undertake rehabilitative measures that are futile," ADES must "provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Id.* at 94, ¶ 20, 219 P.3d at 304 (citations omitted).

¶19 Father contends he "complied with services as he was able" and when he was not able to do so, he contacted ADES but did not receive assistance. Instead, according to Father, ADES

hurried to severance. The evidence supports the juvenile court's rejection of Father's contentions. Because Father did not attend court proceedings concerning Noah's dependency status from June to October 2009, ADES' first opportunity to offer reunification services was substantially delayed. Thereafter, as previously described, see *supra* ¶¶ 8, 16, Father failed to comply with offered services, and A.M. contested Father's assertion that he left unreturned messages with CPS. A.M. further explained that transportation was available for Father to travel for needed services. See *supra* ¶ 16. The juvenile court was free to believe A.M. and disbelieve Father and did not err by finding that ADES made diligent efforts to reunite Father with Noah.

CONCLUSION

¶20 For the foregoing reasons, we affirm the juvenile court's judgment terminating Mother's and Father's parental rights to Noah.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Patrick Irvine, Presiding Judge

/s/
John C. Gemmill, Judge