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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

MELINA B.,) No. 1 CA-JV 10-0161
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R. P. Juv.
SECURITY, ZIRA P., SERRENA P.,) Ct.; Rule 28 ARCAP)
RUSSELL P., CHLOE P.,)
)
Appellees.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. No. JD17348

The Honorable Roger E. Brodman, Judge

AFFIRMED

The Stavris Law Firm P.L.L.C.
By Alison Stavris
Attorney for Appellant

Scottsdale

Thomas Horne, Arizona Attorney General
By Eric Devany, Assistant Attorney General
Attorneys for Appellee Arizona Department of
Economic Security

Mesa

D O W N I E, Judge

¶1 Melina B. ("Mother") appeals from an order terminating her parental rights.¹ For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother is the biological parent of Z., S., R., and C. (the "Children"), born December 22, 2001, September 11, 2004, November 10, 2005, and June 2, 2007, respectively. Mother also has a son, M., born August 22, 1995.

¶3 On January 18, 2008, Mother was in the bedroom watching a movie and trying to sleep before working that evening. She heard three-year-old S. scream. When she asked what happened, the Children responded that nothing was wrong; Mother went back to sleep, expecting Father to check on the Children. When the movie ended, Mother turned on the lights and saw blood on S.'s legs; she called 911.

¶4 Emergency responders found that S. was bleeding from her vagina. She was transported by ambulance to the hospital where emergency surgery was performed.² A forensic nurse

¹ Russell P. ("Father") did not contest Arizona Department of Economic Security's ("ADES") motion to sever his parental rights, and he is not a party to this appeal.

² S. suffered a second degree laceration of the posterior fourchette and a first degree laceration of her labia minora. Additionally, there was a complete tear to the hymen, which was not repaired during surgery; it is unknown whether S. suffered permanent damage to her reproductive system.

examined S. and concluded her injuries were caused by a sexual assault.³

¶15 S. was taken into custody by Child Protective Services ("CPS"). CPS also removed the other children from the home.⁴ Soon thereafter, CPS returned the Children to Mother on the condition that she prevent further contact between the Children and Father or M. Father stayed with his parents, and M. stayed with Mother's parents.

¶16 Detective Jones interviewed Mother. Initially, Mother claimed she did not know who assaulted S. With Mother's consent, a truth verification examination was conducted, which indicated Mother was deceptive about her daughter's injuries. When confronted with the test results, Mother initially said she did not remember how S. was injured, but eventually stated she had stabbed S. in her vagina with a screwdriver. Mother was taken into custody and charged with sexual conduct with a minor.

³ A forensic pediatric doctor opined that S.'s injury was a "horrible, painful, forceful, penetrating injury," that was consistent with an object being forcefully inserted.

⁴ When police entered the home on the date of the assault, they found the house was "fairly bare, with very little furniture" and that it "smelled of rotten food and diapers." The floors were sticky and covered with food droppings. The master bedroom contained two mattresses (without bed frames or box springs) surrounded by used diapers. The children were later found to be in need of dental care: S.'s front four or five teeth were missing due to decay and rot, and R. needed \$2500 in restorative dental care. The Children were not current on their vaccinations.

¶17 The Children were placed with a maternal aunt; M. remained with his grandparents. CPS later learned of unacceptable conditions in the aunt's home (including no running water and fire/safety hazards) and moved the children to a maternal uncle's home. After a few months, the uncle relinquished custody of the Children. S. and Z. were placed together in a foster home, and C. and R. were placed together in a separate foster home.

¶18 In January 2009, the police learned that M. had told a classmate "he raped his sister with a screwdriver and his mother was in jail paying for it." Additionally, Detective Jones was informed that Z. had disclosed to a social worker that M. had sex with her and S. and "made [S.] bleed."⁵ Detective Jones reviewed recorded phone calls placed to Mother in jail. In one call, Mother said, "everyone knows who did it and [Z.] and [S.] already said who it was." Mother was released from jail, and M. was placed in a group home.

¶19 Mother began participating in services, including random drug tests, a psychological evaluation, and parent aide services.⁶ A primary objective was for Mother to learn to

⁵ M. reported that he began having sex with Z. when she was five and admitted numerous instances of sexual conduct with his sisters. He also stated "he would watch pornography with his sisters before being sexual with them."

⁶ All drug test results were negative.

establish boundaries and provide appropriate discipline for the Children. CPS encouraged Mother to talk with M. about his inappropriate behavior and its impact on the family. Mother, however, avoided this subject--even after M. reported that he had been accused of sexually assaulting a peer in his group home. When Mother finally did broach the subject, she sent mixed messages: telling M. he needed to keep his hands to himself, while grinning and laughing. Mother had difficulty setting consequences for negative behavior by the Children as well. On one occasion, she "sat and watched" Z. throw a tantrum because Mother forgot to bring Cheetos to a visit. Z. threw a chair against a wall and knocked over her youngest sister. Staff had to intervene and remove the other children for their protection.

¶10 In December 2009, ADES moved to terminate Mother's parental rights. ADES alleged that Mother willfully abused the Children or failed to protect them from willful abuse and that she was unable to remedy the circumstances that brought the Children into out-of-home placement for fifteen months or longer pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(2) and -533(B)(8)(c). Beginning in April 2010, the juvenile court conducted a six-day severance hearing.

¶11 A human service specialist with the Division of Development Disabilities testified that C. suffers from delays

in gross motor skills, oral motor skills and cognition. R. has been diagnosed with a mild to moderate cognitive disorder and exhibits some features of autism. The specialist expressed concern that, because Z. "dominates the visits" and "requires a lot of attention," Mother could not expend the time necessary to properly parent special needs children like C. and R.

¶12 CPS case manager Sandi Geer testified that the Children were receiving appropriate medical, educational, and emotional care in their foster homes and that their current placements wished to adopt them. While all of the Children were making significant gains physically, emotionally and cognitively, Ms. Geer testified they all were affected by the abuse that had occurred in Mother's home, and she described ongoing incidents of sexual acting out by the Children.

¶13 Ms. Geer explained that a goal of the individual counseling for Mother was to address the circumstances that brought the Children into care and for Mother to take responsibility for her actions and inactions. However, M.'s sexual assault was never addressed openly and honestly with the Children. Mother failed to communicate to M. that his behaviors were unacceptable and further undermined rehabilitative attempts by telling him to just "go through the motions of treatment." Moreover, despite conversations about the need for her daughters to know she believes their reports of abuse and that she is open

and willing to discuss what happened, Mother has avoided the subject. Ms. Geer opined that Mother could not safely parent the Children or set appropriate boundaries for the family.

¶14 Dr. Glenn Moe, a licensed psychologist, conducted a bonding assessment and best interest evaluation. He observed R. and C. and found them "very responsive" to their foster parents, viewing them "as a source of attention as well as some nurturance." He determined they had formed a positive attachment to their foster parents. Similarly, when he observed Z. and S. with their foster parents, Dr. Moe found a positive attachment: "[T]hey listened to the foster parents [and] accepted guidance from them."

¶15 When Dr. Moe observed Mother with the Children, the "visitation became fairly chaotic [and] the children became quite excitable . . . mother did nothing to try to redirect the children or to get some control over the visit." At one point, Z. ordered her mother off the couch, and Mother complied. Dr. Moe opined that Z. was allowed "too much control in a situation like that, especially as she talked and ordered her mother about the room." Dr. Moe was forced to intervene at another point, when Z. was bouncing C. on her knees and letting the toddler fall backward. He was concerned about C. "snapping her neck," though Mother "seemed oblivious to the potential harm."

¶16 Dr. Moe opined that Z., the eldest, had the strongest attachment to Mother, whereas the three youngest children were primarily attached to their foster parents. He recommended severance and adoption for all of the Children.⁷ Dr. Moe expressed concern about Mother's inability to appreciate the gravity of M.'s issues and conduct. He commended Mother's love for her son, but believed that love could overshadow the need to provide for the safety and well-being of the Children.

¶17 The juvenile court terminated Mother's parental rights pursuant to A.R.S. §§ 8-533(B)(2) and -533(B)(8)(c). It found Mother "either knew of the ongoing abuse [by M.], or had her head so very deeply in the sand that she affirmatively chose to ignore it." Additionally, the court found that in attempting to protect M., she "placed her other children in harm's way." The court was not convinced Mother could protect the Children from future harm and found a sufficient nexus between the abuse suffered by S. and Z. and the likelihood that the other children, left in Mother's care, would be subjected to abuse or neglect. The court also found that the Children had been in an out-of-home placement for more than twenty-one months and that ADES had made reasonable efforts at reunification.⁸ It found

⁷ ADES did not seek to sever Mother's parental rights to M.

⁸ Mother has not challenged the adequacy of reunification services offered by ADES.

Mother was unable to remedy the circumstances that caused the Children to be removed from the home and that there was a substantial likelihood she would not be capable of exercising proper and effective parental care and control in the near future.

¶18 Mother timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), and 12-2101(B).

DISCUSSION

¶19 Mother argues the juvenile court erred by finding: (1) she knew or should have known the Children were being abused; (2) she was unable to remedy the circumstances that brought them into care; and (3) termination was in the Children's best interests.

¶20 We view the evidence in the light most favorable to sustaining the juvenile court's findings. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We will not reverse an order terminating parental rights unless the court's factual findings are clearly erroneous. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). A finding is clearly erroneous when there is no reasonable evidence to support it. *Id.*

¶21 Termination of parental rights is governed by A.R.S. § 8-533. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz.

246, 248-49, ¶ 12, 995 P.2d 682, 684-85 (2000). The court must find, by clear and convincing evidence, at least one of the grounds for termination enumerated in A.R.S. § 8-533, and it must find by a preponderance of the evidence that termination is in the best interests of the children. *Kent K. v. Bobby M.*, 210 Ariz. 279, 280, 284, ¶¶ 1, 22, 110 P.3d 1013, 1014, 1018 (2005).

A. Mother's Knowledge of Abuse

¶22 Mother appears to contend there was insufficient evidence to support the finding that she knew or should have known of the abuse, and she invites us to reweigh the evidence presented below. Although there was evidence that, at times, Mother demonstrated proper parenting skills, an appellate court does not reweigh the evidence. The juvenile court was in the best position to assess the credibility of witnesses and weigh the evidence. See *In re Andrew A.*, 203 Ariz. 585, 587, ¶ 9, 58 P.3d 527, 529 (App. 2002).

¶23 To justify severance based on A.R.S. § 8-533(B)(2), the court must find:

That 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.

Sufficient evidence supports the finding that Mother knew or should have known of M.'s sexual abuse of S. and Z. Mother

stated in a recorded phone conversation that everyone knew who had assaulted S. This incident was not the first time M. had sexually abused his sisters. M. admitted having sexual relations with Z. from the time she was five years old. Additionally, Mother's willingness to falsely confess to sexual assault and her resistance to addressing the issues that led to the Children's removal support the conclusion that, at the very least, she was willfully ignorant of the abuse.

¶24 There was a sufficient nexus between the abuse of S. and Z. and the likelihood that R. and C. would be subjected to abuse. In *Linda V. v. Arizona Department of Economic Security*, we held that when parents permit another person to abuse or neglect their children, courts may sever the rights to other children under § 8-533(B)(2), "even though there is no evidence that the other children were abused or neglected." 211 Ariz. 76, 79, ¶ 14, 117 P.3d 795, 798 (App. 2005). The record establishes that R. and C. were affected by the abuse occurring while in Mother's care. Witnesses described how the Children have acted out in a sexualized manner. Testimony by Dr. Moe and Ms. Geer established the likelihood that Mother would ignore warning signs of abuse of C. and R. in the same manner as S. and Z., creating a high risk that the two youngest children would be abused if returned to Mother's care.

B. Best Interests

¶25 To protect a parent's constitutional right to custody and control of a child, "a determination of [the children's] best interest must include a finding as to how [they] would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juvenile Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Factors that support a finding of benefit from severance include the "immediate availability of an adoptive placement," *Audra T.*, 194 Ariz. at 377, ¶ 5, 982 P.2d at 1291, "whether an existing placement is meeting the needs of the child," *id.*, and whether the child is adoptable. *Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

¶26 The evidence established that the Children are doing well in their foster care placements. The foster parents ensure that the Children receive appropriate services, including individual counseling, speech therapy, and occupational therapy. ADES proved that the Children are adoptable, that their foster parents wish to adopt them, and that they have made significant gains since being placed in foster care. Substantial evidence supports the best interests finding.

