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



DIVISION ONE
FILED: 08/30/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL H., LINDA H.,) No. 1 CA-JV 10-0248
)
Appellants,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, GLORIA H., JOSIAH H.) 103(G) Ariz.R.P. Juv. Ct.;
) Rule 28 ARCAP
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD505525

The Honorable, Peter A. Thompson, Judge

AFFIRMED

Robert D. Rosanelli Phoenix
Attorney for Appellant Paul H.

Sandra L. Massetto Phoenix
Attorney for Appellant Linda H.

Thomas Horne, Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorney for Arizona Department of Economic Security

G E M M I L L, Judge

¶1 Paul H. ("Father") and Linda H. ("Mother") appeal the

trial court's termination of their parental rights as to their children. For the following reasons, we affirm.

BACKGROUND

¶2 Father and Mother are the biological parents of Gloria H., born in 1995, and Josiah H., born in 1998.¹

¶3 In February 2005, Child Protective Services ("CPS") received a report that M.H. was displaying inappropriate behaviors in church, such as licking Father's neck and putting her hand in Father's groin.

¶4 During the subsequent CPS and Mesa Police Department joint investigation, Josiah reported that he had had sex with his sister, Gloria, aged nine years at the time. He stated that both of his sisters touched his "wee wee" when his clothes were off, Gloria put his "wee wee" in her "wee wee," and he had seen Gloria having sex with a seven-year-old neighborhood boy. Josiah reported to CPS that he also had had sex with his sister, M.H., but "not too much." Gloria reported that Josiah had tried to have sex with her and that "we did, but not really." She also reported that Josiah had put his penis in her face. When Gloria told Mother about the incident, Gloria reported that Mother told her, "That's [r]estricted." In addition, both Josiah and M.H. reported that there was often a lack of food in

¹ Father and Mother are also the biological parents of a third child, M.H.; however, M.H. has reached the age of eighteen and is not subject to this appeal.

the home. All three children were discovered to have lice with scabbing sores on their scalps. The children also appeared "disheveled" and their clothing smelled of urine.

¶15 Mother revealed that a fifty-year-old neighbor once kissed M.H. on the lips. Father reported that he and Mother would allow the children to have unsupervised visits with the neighbor, even though they had only known the neighbor for three to five months. Following the kissing incident, Mother and Father had a discussion with the neighbor and then continued to allow the children to have unsupervised visits with him.

¶16 Father revealed that the family had previously lived in Colorado, but they left Colorado after CPS authorities had "threatened" to take the children from Mother and Father's care. Father reported that he had considered harming the Colorado CPS worker. Father also made threatening remarks to the CPS worker and Mesa police officers during the 2005 investigation.

¶17 In March 2005, the Arizona Department of Economic Security ("ADES") filed a dependency petition and petition for paternity and/or child support. The petition alleged that Father and Mother were unable to parent due to: 1) a failure to protect their children from sexual abuse; and 2) neglect and having an unfit home. Later that month, the juvenile court found the children to be dependent and approved ADES's plan for reunification. Father and Mother began participating in parent

aide and counseling services.

¶18 In 2006, the court ordered that the case plan be changed to alternative planned permanent living arrangement after insufficient progress had been made through reunification services.

¶19 Gloria reported, in June 2008, that she had been raped by her Father's friend, "Tim," during an unsupervised visit with her parents. Later that same year, the court ordered ADES to conduct a bonding assessment between the parents and children.

¶10 In January 2009, the court ordered that the case plan be changed to severance and adoption. ADES then moved for termination of the parent-child relationship between Father, Mother, and all three children, on the grounds that the parents had failed to remedy the circumstances that caused their children to be in an out-of-home placement after fifteen months time in care.

¶11 ADES withdrew its motion to terminate in June 2009, and the court ordered that the case plan be changed to family reunification. The court relieved ADES from conducting a bonding assessment but ordered that ADES provide each parent with an updated psychological and psychiatric evaluation to be performed by the original evaluators. The court later ordered that Father and Mother be provided with individual counseling.

¶12 In February 2010, M.H. reached the age of eighteen

years, and the court approved ADES's case plan for independent living for M.H. ADES again moved to terminate the parent-child relationship between the parents and Gloria and Josiah, on the grounds that: 1) Father and Mother were unable to discharge their parental responsibilities due to mental illness and reasonable grounds existed to believe that the condition would continue for a prolonged indeterminate period; and, 2) the children had been in out-of-home care for fifteen months or longer.

¶13 Prior to the severance hearing, Father and Mother had received the following services from ADES: three parent aide referrals, psychological evaluations, psychiatric evaluations, psycho-sexual evaluations, counseling, transportation, and supervised and unsupervised visitation. Mother attended individual counseling with Derek Lofgreen beginning in April 2005 and concluding in April 2009. Father attended counseling with Lofgreen from April 2005 through August 2007. Father and Mother also both received psychiatric evaluations from Dr. Parker in May 2005. Father participated in a psychological evaluation with Dr. Silberman in June 2005, and Mother participated in a psychological evaluation with Dr. Silberman in August 2005. In September 2005, Father and Mother also completed psychosexual evaluations with Dr. Grey. Father and Mother completed updated psychological evaluations with Dr.

Silberman in August 2009, and, in February 2010, the parents were enrolled in counseling through Empact. Dr. Pyburn, a psychologist, interviewed the children and conducted a best interests evaluation.

¶14 A six-day severance hearing commenced in June 2010 and concluded in October 2010. CPS Case Manager Chuck Cean, Dr. Silberman, Derek Lofgreen, and Dr. Pyburn testified at the hearing.

¶15 Dr. Silberman testified that he had diagnosed Mother as having major depression, and she showed symptoms of a schizoid personality disorder. He stated that Mother exhibited "sexualized behavior" and "denial," and he did not believe Mother could make the behavioral changes necessary for her to effectively parent her children. Dr. Silberman testified that Father also exhibited signs of "[v]ery strong denial." He had previously diagnosed Father as having schizotypal personality disorder, and he did not believe Father could make the changes necessary to parent his children. Dr. Silberman opined that neither Father nor Mother would be capable of parenting in the foreseeable future and that their conditions would continue for indeterminate period of time.

¶16 Following the hearing, the court took the matter under advisement. In November 2010, the court found that ADES proved, by clear and convincing evidence, that Father and Mother were

unable to discharge their parental responsibilities due to mental illness and mental deficiency and there were reasonable grounds to believe the condition would continue for a prolonged, indeterminate period. The court further found by clear and convincing evidence that ADES made a diligent effort to provide reunification services, the children have been in an out-of-home placement for fifteen months or longer, Father and Mother were unable to remedy the circumstances which caused the children to be in an out-of-home placement, and there was a substantial likelihood that neither parent would be capable of exercising proper and effective care in the near future. Lastly, the court found, by a preponderance of the evidence, that termination of the parental rights was in the children's best interests. The court noted that "no witness testified at trial that either parent is able to discharge their parental responsibilities now or would likely be able to do so in the future."

¶17 Father and Mother timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235 (2007) and 12-120.21 (2003).

ANALYSIS

¶18 Father's sole issue on appeal is that the trial court erred in finding that ADES made a diligent effort to provide him with appropriate reunification services. Mother joins Father in appealing the severance based on insufficient reunification

services, plus Mother also appeals on the ground that the trial court erred in finding that severance was in the children's best interests.

¶19 Pursuant to A.R.S. § 8-533(B) (Supp. 2010), an order terminating parental rights must be supported by clear and convincing evidence showing at least one statutory ground for severance and by a preponderance of the evidence indicating that severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We view the facts in a light most favorable to affirming the court's order, and we do not reweigh the evidence on appeal. *Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994); *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12, 53 P.3d 203, 207 (App. 2002). Furthermore, "[w]e will not disturb the juvenile court's order severing parental rights unless [the court's] factual findings 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).

¶20 ADES must "prove by clear and convincing evidence that it had made a reasonable effort to provide [Mother and Father] with rehabilitative services or that such an effort would be futile." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 193, ¶ 42, 971 P.2d 1046, 1054 (App. 1999); see also A.R.S.

§ 8-533(B)(8) (ADES is required to make a diligent effort to provide appropriate reunification services prior to termination). In addition, while ADES is not required to undertake rehabilitative measures that would be "futile," it must "undertake measures with a reasonable prospect of success." *Mary Ellen C.*, 193 Ariz. at 192, ¶ 34, 971 P.2d at 1053. "Although CPS need not provide 'every conceivable service,' it 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 ¶ 37 (quoting *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994)).

¶21 Father argues that he was not provided with PhD level counseling, a bonding assessment, or updated evaluations by a psychiatrist and psychologist. Mother also argues that she was not provided with PhD level counseling, PTSD counseling, or reasonable accommodations for her hearing disability.

¶22 ADES provided Father and Mother with the following services: three parent aide referrals, psychological evaluations, psychiatric evaluations, psycho-sexual evaluations, counseling, transportation, and supervised and unsupervised visitation.

¶23 In June 2009, the court relieved ADES from its previously imposed obligation to provide a bonding assessment

and PhD level counseling. Further, pursuant to court orders, ADES provided Father and Mother with an updated evaluation with Dr. Silberman, a psychologist, in August 2009.

¶24 Additionally, at the severance hearing, Dr. Silberman testified that a "higher level of counseling[,] such as PhD level counseling" would not be beneficial to Father nor Mother. Specifically, he stated that individuals with Father's diagnoses do not "see their problems," and he stated that it was "very difficult, if not impossible" for individuals with personality disorders, such as Mother, "to make any kind of major changes." Dr. Silberman, in his more recent evaluation, did not recommend Father and Mother undergo PhD counseling.

¶25 Although Mother and Father did not receive an updated psychiatric evaluation, the record supports the conclusion that the court ultimately found the psychological evaluation by Dr. Silberman to be sufficient. In August 2009, two months after the court ordered that Mother and Father receive an updated psychiatric evaluation, the court found that ADES had made reasonable efforts to finalize the permanency plan. In that ruling, the court crossed "psychiatric evaluation" off of the list of services that ADES had requested or provided to Father and Mother. The court also noted that "[t]he parents are scheduled to meet with Dr. Silberman on 8/13/2009 to update their psychological and psychiatric evaluations." Dr. Silberman

did re-evaluate the parents, produce a report, and then testify at the severance hearing in 2010. Additionally, Cean testified that CPS was prevented from complying with the order for a psychiatric evaluation because "[t]here was no recommendation for a psychiatric re-evaluation." It is clear from this record that the court was aware that an evaluation with a psychiatrist would not be provided and that the evaluation with Dr. Silberman was sufficient, in combination with the totality of evaluations, reports, testimony, and information.

¶126 Further, while Mother alleges that ADES should have provided her with PTSD counseling, Cean testified that the counseling offered to Mother was "all encompassing" and would have "address[ed] any such traumatic symptoms."

¶127 It is unclear from Mother's opening brief what types of accommodations Mother wished ADES to provide in regard to her hearing disability. Specifically, it appears Mother was able to participate in all counseling and parent aide services.

¶128 Upon this record, we conclude that the evidence is sufficient to support the trial court's finding that ADES made a diligent effort to provide reasonable reunification services.

¶129 Mother further appeals on the grounds that the trial court erred in finding that severance was in the children's best interests. When considering the children's best interests, the court must make a "finding as to how the child would benefit

from a severance or be harmed by the continuation of the [parental] relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (citations omitted; emphasis in original). Evidence of an existing adoptive plan, or that a child is adoptable, supports a finding of termination of the parental relationship. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004). The juvenile court may also consider whether the children's needs are being met. *Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994).

¶30 At the severance hearing, Dr. Pyburn testified that severance and adoption was in the children's best interests. Dr. Pyburn had been asked by CPS to do a consultation with Father and Mother's children in November 2008, and she met with the children individually and as a group. She stated that the children informed her that they wanted to live with their foster parents, and the children had "significant" concerns about returning to live with Father and Mother because they "did not feel safe."

¶31 Additionally, Cean testified at the hearing that Gloria and Josiah had been in an adoptive placement since 2005. He opined that the children were doing very well in the placement and the placement was meeting all of their needs.

¶32 Based on the evidence in this record, the juvenile

court did not err in finding that termination was in the children's best interests.

CONCLUSION

¶33 For the foregoing reasons, we affirm the trial court's termination of Paul H.'s and Linda H.'s parental rights to these two children.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Judge

_____/s/_____
DONN KESSLER, Judge