

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
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

KRISTEN M. ,) No. 1 CA-JV 10-0253
)
Appellant,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY and T.M.,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD504831

The Honorable Mark F. Aceto, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Claudia Acosta Collings
Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Jeffrey M. Zurbriggen PC Phoenix
By Jeffrey M. Zurbriggen
Attorney for Appellant

J O H N S E N, Judge

¶1 Kristen M. ("Mother") appeals the superior court's order terminating her parental rights as to her son, T.M., who was born in 1999. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In October 2008, Child Protective Services ("CPS") received a report alleging Mother abused prescription drugs and failed to protect her son from inappropriate acts by her boyfriend. The Arizona Department of Economic Security ("ADES") filed a dependency petition, which the superior court granted in April 2009.

¶3 ADES referred Mother to TERROS for substance abuse assessment and treatment. Because she failed to fully participate, missing at least eight counseling sessions, TERROS eventually stopped her services. Mother submitted to random urinalysis testing by TASC. Although her samples were negative for drugs between October 2008 and March 2009, the majority of her samples were dilute. She tested positive for cocaine and opiates in mid-March and again for opiates in early April 2009.

¶4 In August 2009, Mother voluntarily sought treatment at the Center for Behavioral Health ("CBH"), a substance-abuse treatment center and methadone clinic. CBH diagnosed her as opioid-dependent and gave her methadone to decrease withdrawal symptoms and prevent cravings. Shortly after beginning treatment at CBH, Mother contacted her case manager and

requested a second referral for random urinalysis testing. She also re-engaged with counseling and parent-aide services, actively participating in child and family team meetings and resumed family therapy. According to a CPS progress report, Mother's parenting techniques improved and she demonstrated the proper balance between parental affection and authority.

¶15 In March 2010, however, Mother was dropped from counseling and parent-aide services because she was not fully participating in those services. In April 2010, her case manager recommended that her case plan change from family reunification to severance and adoption, and on April 30, 2010, ADES filed a motion to terminate Mother's rights as to T.M. on the grounds that she was unable to discharge her parental responsibilities due to chronic drug abuse pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(3) (Supp. 2010) and 15 months' time in an out-of-home placement pursuant to § 8-533(B)(8)(c).¹ Thereafter, according to CBH records, Mother's drug test results at CBH were negative except that she tested positive for benzodiazepines in June 2010 and once for opiates on August 24, 2010.

¶16 Over two days of trial in November 2010, the medical director of CBH testified that Mother remained "fully compliant

¹ Although this statute was amended after the relevant date, the revisions are immaterial to the disposition of this appeal. Thus, we cite to the current published version of the statute.

and [had] made progress in the [rehabilitation] program." The director further explained that Mother's prescription cough syrup could account for the positive opiate test result in August 2010. The director also testified that Mother had "absolutely" remedied any drug addiction that she may have had.

¶7 The superior court granted the motion to terminate on both alleged grounds. Mother timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and pursuant to A.R.S. § 8-235 (2007).

DISCUSSION

A. Legal Principles.

¶8 Before the superior court may terminate a parent's rights it "must find, by clear and convincing evidence, at least one of the statutory grounds set out in" A.R.S. § 8-533(B). *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court also must find that severance is in the child's best interests by a preponderance of the evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). As the trier of fact, the superior court "is in the best position to weigh the evidence"; we accept the "court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a [termination] order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't*

of Econ. Sec., 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

B. The Superior Court Did Not Abuse Its Discretion in Declining to Grant the Entire Continuance Mother Sought.

¶9 Mother first argues the superior court violated her due process rights and her right to counsel by denying a motion to continue she made shortly before trial. Because she did not raise these arguments in the superior court, she has waived them on appeal. See *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994); *City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991).

¶10 The permanency planning hearing in Mother's case was held on April 20, 2010, and ADES filed its motion to terminate parental rights 10 days later. After several failed attempts to mediate an agreement, the court on August 17 scheduled trial for October 29 and November 12. Mother filed her motion to continue on October 19. In her motion, Mother asked the court to continue the severance hearing for "60-75 days." She said she just had retained new counsel. She said she was "completely unprepared for the termination trial," she had "very limited discovery," lacked case notes, court reports and did "not know what to expect at trial." The court granted a limited continuance, setting trial for November 12 and 17.

¶11 "The grant or denial of a continuance is reviewed only for an abuse of discretion." *In re Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, 369, ¶ 10, 78 P.3d 1088, 1090 (App. 2003).² Pursuant to Arizona Rule of Procedure for the Juvenile Court 46(F), a motion to continue "shall be granted only upon a showing of good cause." When a motion such as Mother's is made to continue a termination hearing for more than 30 days beyond the 90-day timeframe set by Rule 66(B) of the Arizona Rules of Procedure for the Juvenile Court, the motion "shall only be granted upon a finding of extraordinary circumstances." Ariz. R.P. Juv. Ct. 66(B).

¶12 We cannot conclude the superior court abused its discretion in granting Mother's request to continue the trial but in denying the lengthy continuance she sought. Mother received notice that the State planned to begin termination proceedings against her in April 2010. Thus, she had more than six months' notice of the termination proceedings. Although she

² Mother argues we should review the superior court's orders *de novo* because, she contends, the court applied incorrect rules of law or misapplied the law to the facts. In reviewing the superior court's decision to grant a limited trial continuance, however, we apply an abuse-of-discretion standard. See *In re Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, 369, ¶ 10, 78 P.3d 1088, 1090 (App. 2003); see also *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.").

argues on appeal that she hired counsel because she could not make contact with her prior appointed counsel, that she was "disallowed" from "obtaining further evaluations and preparing a proper defense," and that she "was unable to secure several witnesses she wanted to have testify," the record does not demonstrate that she made these arguments to the superior court, nor does she explain how the evaluations and additional witnesses would have changed the outcome at trial.

C. The Superior Court Did Not Abuse Its Discretion in Severing Mother's Parental Rights Due to Time in Care.

¶13 The superior court ordered Mother's rights terminated pursuant to A.R.S. § 8-533(B)(8)(c). This section permits a court to sever parental rights if clear and convincing evidence establishes that

[T]he 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, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and . . . :

* * *

The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer . . . the parent has been unable to remedy the circumstances that cause the child to be in an 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.

A.R.S. § 8-533(B)(8)(c); see *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685.

¶14 The superior court in its findings of fact stated the following:

[T]he mother remains unable to care for the child. In addition to her failure to remedy her substance abuse condition, the mother has also failed to . . . demonstrate effective parenting techniques and was closed out from parent aide services unsuccessfully. The mother has also failed to achieve and maintain financial or housing stability. The mother is still unemployed and has failed to obtain stable housing, free from individuals that make the child fearful. The mother recently married an individual that the child has reported he does not want to live with.

¶15 The court's conclusion that Mother failed to demonstrate effective parenting techniques is supported by evidence that she did not successfully finish one-on-one parent-aide sessions and counseling. The caseworker testified that when T.M. was removed, ADES informed Mother she needed to "remedy" "substance abuse issues, her failure to protect and codependency issues." ADES arranged for Mother to receive counseling through Empact, through which she could address codependency issues in a program called Empowerment. Although Mother participated in an intake session at Empact on December 7, 2009, she did not begin counseling there until May 26, 2010. Moreover, Mother did not successfully complete the counseling,

which demonstrated to the caseworker that Mother lacked "a clear understanding of the issues that brought her child into care." She also failed to take responsibility for failing to protect T.M. and continued to minimize his feelings.

¶16 Throughout the dependency, Mother's case manager expressed concern about Mother's unstable employment and housing, and that instability continued through the time of trial. At the severance hearing Mother admitted to having been unemployed for "about a year." Mother married M.J. on October 15, 2010, just two weeks before trial was to begin.³ Although M.J. reportedly considers T.M. his son, T.M. earlier had told a counselor that he only wanted supervised visitation with M.J. and did not want to live with him. Moreover, although T.M. had told of instances in which M.J. had choked and punched him, Mother testified that she did not believe these statements. Nevertheless, Mother conceded that her son was traumatized by a choking incident that occurred when he and M.J. were on vacation together. She did not inform T.M. before marrying M.J., and when Mother eventually told him of her marriage, he "broke down and cried." In counseling sessions several months prior to the wedding, Mother said she "wanted to get away from" M.J. and that he was trying to control her by buying her love. She admitted

³ M.J. is not the "boyfriend" referred to *supra* ¶ 2.

that part of her motivation in marrying M.J. was to comply with ADES's requirement that she stabilize her housing situation.

¶17 Mother argues on appeal that her son told a counselor he had exaggerated the choking incident and that he "missed" M.J. T.M. reportedly told the same counselor that he thought M.J. "is really nice." We do not reweigh the evidence before the superior court. *Jesus M.*, 203 Ariz. at 282, ¶ 12, 53 P.3d at 207. Given the evidence, we cannot conclude the superior court abused its discretion in finding by clear and convincing evidence that Mother was unable to remedy the circumstances that caused T.M.'s placement. Neither can we conclude the superior court abused its discretion in finding by clear and convincing evidence there is a substantial likelihood that she will not be capable of exercising proper and effective parental care and control in the near future, pursuant to A.R.S. § 8-533(B)(8)(c).⁴

¶18 Mother also argues the court erred by finding that ADES made diligent efforts to reunify the family. See A.R.S. § 8-533(B)(8). ADES is required to provide a parent "with the time and opportunity to participate in programs designed to help her become an effective parent." *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App.

⁴ Because we affirm termination of Mother's parental rights on this ground, we do not reach the alternative ground on which the court issued its order, substance abuse pursuant to A.R.S. § 8-533(B)(3).

1994). But ADES is not required to provide a parent with every conceivable service or to ensure that a parent participates in every service it offers. *Id.*

¶19 The record contains evidence that ADES provided Mother family counseling, parenting classes, supervised visitation and child and family team meetings. Mother failed to complete the parent-aide and counseling services that ADES offered her. The Empact provider informed Mother in June 2010 that she needed to contact a different provider for a codependency support group, but Mother never followed up; she also missed a few group counseling sessions at Empact and stopped attending entirely in September 2010. Accordingly, we cannot conclude that the superior court erred by finding that ADES provided Mother with the time and opportunity to participate in reunification services and made reasonable efforts to rehabilitate her ability to care for her son.

¶20 Finally, Mother argues that severance was not in T.M.'s best interests. "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (emphasis in original). The existence of an adoption plan can fulfill the best interest requirement of the statute. *Mary Lou C. v. Ariz. Dep't of Econ.*

Sec., 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004); *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998).

¶21 T.M. is living with a maternal aunt who is willing to adopt him. The ADES case manager reported T.M. is "very happy" and "very comfortable" in his current placement and that it gives him the consistency and structure to become well-adjusted. Although there was evidence that the placement's marriage may not be stable and that she has driven on a suspended driver's license, substantial other evidence supports the superior court's decision that severance is in the best interests of the child.

CONCLUSION

¶22 For the reasons stated above, we affirm the superior court's order severing Mother's rights as to her child.⁵

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

DANIEL A. BARKER, Presiding Judge

/s/

MAURICE PORTLEY, Judge

⁵ We amend the caption in this appeal to refer to the child by his initials.