IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRISNA S.,	)	No. 1 CA-JV 11-0086
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	MEMORANDUM DECISION
	)	
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, SAMUEL Z.,	)	(Not for Publication – 103(G) Ariz.R.P., Juv. Ct.; Rule 28 ARCAP
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS11682

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Denise L. Carroll — Scottsdale
Attorney for Appellant

Thomas Horne, Attorney General — Phoenix
By Michael F. Valenzuela, Assistant Attorney General
Attorney for Arizona Department of Economic Security

G E M M I L L, Judge

¶1 Brisna S. ("Mother") appeals the juvenile court's termination of her parental rights as to her son, Samuel. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Brisna and Pedro Z. ("Father") are the parents of Pedro, born in 2007, Brianna, born in 2004, Brisna, born in

2010, and Samuel, born in 2010.[1] In February 2011, the Arizona Department of Economic Security ("ADES") filed a petition to terminate Mother and Father's parental rights as to Samuel, alleging that the parents were unable to discharge their parental responsibilities due to mental deficiency and mental illness.

¶3 Child Protective Services ("CPS") originally removed the two eldest children in 2008 due to neglect. Following the death of Mother and Father's other child at the age of one month, the police had concerns about Mother's cognitive abilities and her ability to parent her remaining children. During a meeting between CPS and Mother and Father, Mother admitted to leaving Brianna and Pedro, at that time ages three and one, respectively, home alone. The children were returned to Mother and Father in December 2009 after a parent aide thought Mother and Father were "doing well."

¶4 Mother gave birth to another child, Brisna, in February 2010. Shortly after her birth, Brisna was hospitalized for respiratory distress and placed on an apnea monitor. The apnea monitor was to be continued at home following her discharge from the hospital. In March 2010, following an appointment with the family reunification team, the therapist

[1] This appeal involves only the termination of Mother's parental rights as to Samuel.

noticed that the baby did not have her apnea monitor on and the children were not in car seats. As a result of this incident, CPS removed the children for a second time.

¶5 Mother gave birth to Samuel in December 2010. Due to the open dependency case for Briana, Pedro, and Brisna, a protective action plan was put in place to protect Samuel. Mother's sister agreed to be a safety monitor for the family, and Mother, Father, and Samuel moved in with the sister. All parties agreed to and signed the protective action plan, which included Mother and Father staying with the safety monitor (the sister) until hearing from their CPS worker. CPS removed Samuel from the home after the CPS worker called Mother to arrange a follow-up meeting, and Mother admitted she and Father had left the sister's home and were in their home alone with Samuel.

¶6 A two-day contested severance hearing was held in March 2011, in conjunction with dependency adjudication hearings on Samuel and termination hearings on the parents' three other children. A psychologist, parent aide, CPS case manager, and the maternal grandmother testified at the hearing.

¶7 The court found, by clear and convincing evidence, that "the parents were unable to discharge their parental responsibilities because of mental illness and mental deficiency and there are reasonable grounds to believe that the conditions

will continue for a prolonged indeterminate period of time." The court further explained:

> [t]he [c]ourt acknowledges that when mental illness is alleged as a ground for termination, the Department must undertake reasonable efforts to provide services to address the parent's mental health issues and preserve the family relationship. *Mary Ellen C. v. [Ariz. Dep't of Econ. Sec.]*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999). Here, [ADES] has clearly met that burden. . . . [T]he parents received a total of four parent aides, two family reunification teams, two psychological evaluations, transportation and referrals for counseling. CPS also assisted [M]other with a referral for [ADES' Division of Developmental Disabilities ("DDD")] services for herself and with obtaining services from Healthy Families for Brisna. Further, these services were provided for more than two years. In addition, Dr. DeSoto testified that the services provided to the parents were appropriate and gave the parents a fair opportunity to develop their parenting skills. She said that additional services would be futile.

The court further found, by a preponderance of the evidence, that termination of the parental relationship was in Samuel's best interest. The court concluded that "[h]ere, the termination of the parents' rights will free Samuel for adoption by the current foster mother, . . . [a]nd, even if that particular placement does not work out, the CPS case manager is confident that Samuel is adoptable." The court, therefore, ordered the termination of Mother and Father's parental rights to Samuel.

¶8 Mother timely appealed,[2] and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235 (2007) and 12-120.21 (2003).

DISCUSSION

¶9 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 interest. A.R.S. § 8-533(B) (Supp. 2009);[3] *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We do not reweigh the evidence on review of the juvenile court's findings, and we view the facts in a light most favorable to affirming the court's order. *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). In addition, "[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

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[2] Father is not a party to this appeal. During the severance hearing, Father decided he no longer wanted to contest the severance, and, instead, asked the court to take notice of the fact that he believed it was in "the best interest of his children to be adopted at this point." The court decided to continue on with the trial, "especially since [Mother] [had not] made a decision."

[3] We cite to the current version of the statute when no revisions material to this decision have occurred.

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).

¶10 Mother argues that the juvenile court erred in finding that there was clear and convincing evidence that she was unable to discharge her parental responsibilities because of mental illness and that the condition would continue for a prolonged period of time. She further argues that ADES had not made reasonable efforts to reunite her with her son.

¶11 To establish evidence sufficient to prove termination based on mental illness, ADES must prove:

> [t]hat the parent is unable to discharge parental responsibilities because of mental illness [or] mental deficiency . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

A.R.S. § 8-533(B)(3). In addition, ADES must "prove by clear and convincing evidence that it had made a reasonable effort to provide [Mother] with rehabilitative services or that such an effort would be futile." *Mary Ellen C.,* 193 Ariz. at 193, ¶ 42, 971 P.2d at 1054; *see also* A.R.S. § 8–533(B)(8) (ADES must make a diligent effort to provide appropriate reunification services prior to termination). In addition, while ADES need not 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.

¶12 CPS provided Mother with four parent aide services, two family reunification services, two psychological evaluations, transportation, and referral for counseling.

¶13 Dr. De Soto, a psychologist, testified at trial that she conducted an evaluation of Mother in July 2010. Mother conversed with Dr. De Soto in Spanish, and Mother stated that she had "sustained considerable trauma while growing up," which included sexual assault and drug use. Mother received social security disability income for cognitive disabilities, and she had completed the eighth grade in school. Dr. De Soto provided Mother with a cognitive functioning test, and Mother scored "poor to below average." Dr. De Soto administered part of the test orally, due to Mother's inability to read and write, and she gave Mother the opportunity to ask questions if she did not understand the test items. Dr. De Soto said Mother made "poor eye contact" with her and was very "vague" in her speech. Dr. De Soto also administered the child abuse potential inventory, and Mother had an "elevated" score, which meant there was "significant likelihood that [Mother] may engage in some sort of abusive behavior toward kids." She opined Mother's ability to cope with stress was "very poor," and she had concerns about Mother's ability to provide appropriate care for her children. When asked about the situation with CPS' removal of the children

due to the lack of car seats for the children, Mother stated that the car seats were in the trunk, but Mother and Father never "bothered to look into the trunk to see that the car seats were there." Dr. De Soto said this answer showed Mother "did not have . . . [a] true understanding of what the issue was. The issue was not whether she had the car seats or not, but whether those car seats were appropriately placed and securely placed . . . in the car." She further opined that any further services provided to Mother to assist her in parenting independently "would be futile."

¶14 Dr. De Soto diagnosed Mother as having depressive disorder, not otherwise specified, dependent personality disorder, and mild mental retardation. She opined that Mother's condition rendered her incapable of discharging her parental responsibilities and there were reasonable grounds to believe the condition would last for a prolonged, indeterminate period of time.

¶15 Jennifer Sierra, a parent aide, testified at the hearing that she had been working with Mother and Father for over a year on parent aide skills. She testified that in October 2010, during a visit between Mother and Father and the three older children, Brianna ran into the street. Mother was "hesitant on what to do," so Sierra had to "actually run after Brianna as she was going towards the street . . . and discipline

the child because Mother was unable to do so." While Mother did complete her parenting classes, she expressed to Sierra that "by the end of the classes [she] did not understand most of the concepts that were presented." She was concerned about Mother's ability to provide educational instruction to her children because Mother was "unable to help them with their homework and correct them when they are wrong." Even though Sierra had "sat down with her and gone over" how to make a bottle for the baby, Sierra was not confident that Mother could do so on a regular basis without assistance. Specifically, Sierra pointed to an incident in November 2010 when Mother forgot how to make the bottle for the baby. If a crisis with the children occurred, Sierra did not believe Mother could maintain her composure and provide for the children's needs. According to Sierra, Mother was also "unable to retain critical information." Sierra testified that during a visit with Samuel, Mother thought Samuel was not breathing and "panicked." Mother looked to Sierra "for help and assistance," and Sierra sat next to Mother and explained that Samuel was just stretching and "that it was okay."

¶16 Tammy MacAlpine, the CPS Case Manager, testified at the hearing that it was "safety issues regarding the parents' ability to respond at time when the children [were] in unsafe situations" that kept the children in CPS' care. MacAlpine

opined that Mother was not capable of providing appropriate care for any of the children. MacAlpine testified that Mother was provided with a VCR to ensure she received video instruction because she could not read. She also testified that Mother had received two years of parent aide classes, and Mother was referred to Potter's House for counseling. Mother was in counseling for a year following the first removal, and was currently still attending counseling at the time of the severance hearing, following the second removal. MacAlpine also testified that Mother's first psychological evaluation was conducted by Dr. Menendez in 2009. Dr. Menendez found Mother to have a cognitive deficiency and found it would be difficult for Mother to parent. Dr. Menendez recommended Mother be referred to DDD services, so MacAlpine took the forms to Mother's home and sent the forms in for her.

¶17 We conclude that the evidence is sufficient to support the trial court's finding by clear and convincing evidence that Mother was unable to discharge her parental responsibilities due to mental illness or mental deficiency and reasonable grounds existed that this condition may continue for a prolonged, indeterminate period. The evidence is also sufficient to support the court's finding that ADES had made a reasonable effort to provide Mother with rehabilitative services.

¶18 Mother also argues the trial court erred in finding that termination was in the children's best interest. Specifically, Mother asserts the State did not prove beyond a preponderance of the evidence that the children will accrue an affirmative benefit from her parental rights being severed.

¶19 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" when considering the children's best interest. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (citations omitted). A current adoptive plan is evidence that a child would benefit from severance. *Id*. at 6, 804 P.2d at 735. In addition, evidence showing that a child is adoptable supports a finding of termination of the parental relationship. *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

¶20 MacAlpine testified that Samuel was placed with the sister of the foster parent caring for Mother's other three children. She testified that Samuel was "doing well" in this placement, and the placement had expressed an interest in adopting him. MacAlpine further opined that, if the current placement could not adopt Samuel, Samuel was adoptable and there were other potential relative placements available.

¶21 Based on this testimony at the hearing, the evidence supports the trial court's determination, by a preponderance of the evidence, that termination was in Samuel's best interest.

CONCLUSION

¶22 For the foregoing reasons, we affirm the trial court's termination of Mother's parental rights as to her son, Samuel.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

___/s/_____
JON W. THOMPSON, Presiding Judge

___/s/_____
MAURICE PORTLEY, Judge