FILED BY CLERK
SEP 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SYLVIA B., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DIEGO B., Appellee.	2 CA-JV 2012-0045 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18352500

Honorable Gus Aragón, Judge

AFFIRMED

Sarah Michèle Martin — Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Michelle R. Nimmo — Tucson
Attorneys for Appellee Arizona Department of Economic Security

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V Á S Q U E Z, Presiding Judge.

¶1 Sylvia B. appeals from the juvenile court's order terminating her parental rights to her son, Diego B., born October 2004, on the grounds of abuse pursuant to A.R.S. § 8-533(B)(2) and court-ordered time in care pursuant to § 8-533(B)(8)(c).[1] Sylvia argues the court erred in determining the Arizona Department of Economic Security (ADES) was not required to provide reunification services before severance was permitted on abuse grounds and in determining that the reunification services provided were adequate. She additionally asserts the court impermissibly "delegate[ed]" its "judicial power" in denying visitation and insufficient evidence supported the court's finding that termination was in Diego's best interests. We affirm.

¶2 A juvenile court may terminate a parent's rights if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent's rights is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). "[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court's decision, and we will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

[1]The juvenile court also terminated the parental rights of Diego's father, who is not a party to this appeal.

¶3 In May 2010, ADES took custody of Diego based on allegations of abuse by Sylvia and filed a dependency petition based on that abuse. Although Sylvia denied those allegations, she was later convicted of felony child abuse, and the juvenile court found Diego dependent in June 2010. ADES provided reunification services including individual counseling and classes for parenting, anger management, and substance abuse. Sylvia remained compliant with her case plan throughout the dependency. At a dependency review hearing in December 2010, she requested that she be permitted visitation with Diego. After holding a visitation hearing, the court denied her request, further ordering that ADES "shall have the discretion to allow that contact if and when it is therapeutically recommended."

¶4 Although Sylvia continued to participate in services, Diego's therapist did not recommend visits with Diego. In December 2011, the juvenile court changed the case plan to severance and adoption, and ADES filed a motion to terminate Sylvia's parental rights on abuse and time-in-care grounds. Following a contested severance hearing, the court granted the motion on both grounds, additionally finding that severance was in Diego's best interests. This appeal followed.

¶5 Because it informs our discussion of the other issues Sylvia raises on appeal, we first address Sylvia's argument that the juvenile court impermissibly delegated its judicial power when it denied visitation and ordered that ADES "shall have discretion to allow [visitation] if and when it is therapeutically recommended." We agree with ADES that we lack jurisdiction to consider this claim. Section 8-235, A.R.S., governs our jurisdiction of appeals from juvenile court rulings and provides that "[a]ny aggrieved party in any juvenile court proceeding . . . may appeal from a final order of the juvenile

court." It has long been the law in Arizona that an order terminating visitation is a final, appealable order. *In re Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 374-75, 873 P.2d 710, 712-13 (App. 1994). The court's order denying Sylvia visitation was similarly final because, like the order terminating visitation in *JD-5312*, it "conclusively define[d] [Sylvia's] rights regarding visitation of her child[]," specifically setting forth that she had none unless ADES or the court determined it was therapeutically appropriate. *Id.* Because Sylvia did not timely appeal that order,[2] *see* Ariz. R. P. Juv. Ct. 104(A), we lack jurisdiction to consider its propriety, *see In re Pima Cnty. Juv. Action No. S-933*, 135 Ariz. 278, 279-80, 660 P.2d 1205, 1206-07 (1982).

¶6 Relying on *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), Sylvia asserts the juvenile court erred in concluding ADES was not required to show that it diligently had provided appropriate reunification services in order to justify severance on abuse grounds pursuant to § 8-533(B)(2). When termination is sought pursuant to § 8-533(B)(2), nothing in the statute requires the juvenile court to consider "the availability of reunification services to the parent and the participation of the parent in these services." § 8-533(D). In *Mary Ellen C.*, however, we determined that, "in mental-illness-based severances," ADES has an

[2]Sylvia argues the juvenile court's order denying her visitation request was interlocutory and not appealable because it contemplated further proceedings. Even assuming Sylvia is correct, the court reaffirmed its finding of dependency in April 2011—a final, appealable order that would have subsumed any previous interlocutory orders. *See* A.R.S. § 12-2101(A); *Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 4, 1 P.3d 155, 156 (App. 2000) ("Orders declaring a child dependent, reaffirming a finding of dependency, or dismissing a dependency proceeding are final, appealable orders."); *Decola v. Fryer*, 198 Ariz. 28, n.2, 6 P.3d 333, 335 n.2 (App. 2000) ("[A]ll interlocutory orders are subsumed into the final judgment.").

obligation, based on "constitutional grounds," to make "a reasonable effort to preserve the family" with rehabilitative measures. 193 Ariz. 185, ¶¶ 32-34, 971 P.2d at 1052-53.

¶7 We are not convinced, however, that those same principles apply when termination is based on neglect or abuse. *See Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 11, 200 P.3d 1003, 1007 (App. 2008) ("[N]either § 8-533 nor federal law requires that a parent be provided reunification services before the court may terminate the parent's rights on the ground of abandonment."); *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, ¶ 15, 993 P.2d 462, 467 (App. 1999) (ADES not required to provide reunification services when parent has abandoned child); *see also James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶ 9, 106 P.3d 327, 329 (App. 2005) (finding no constitutional requirement to provide reunification services when termination based on incarceration, which such services "could [not] ameliorate"). But, because the court found ADES had provided sufficient reunification services in concluding termination was appropriate on time-in-care grounds pursuant to § 8-533(B)(8)(c), we need not decide this question because any error was harmless. *See Goodman v. Samaritan Health Sys.*, 195 Ariz. 502, ¶ 11, 990 P.2d 1061, 1064 (App. 1999) ("It is sound judicial policy to avoid deciding a case on constitutional grounds if there are nonconstitutional grounds dispositive of the case.").

¶8 Sylvia further asserts that the juvenile court erred in concluding ADES had made diligent efforts to provide reunification services because she was not permitted visitation with Diego. To the extent Sylvia can raise this argument, having failed to appeal the court's orders denying visitation, we find no error. Sylvia correctly points out that ADES fails to provide adequate reunification services when it "neglects to offer the

very services that its consulting expert recommends." *Mary Ellen C.*, 193 Ariz. 185, ¶ 37, 971 P.2d at 1053. Sylvia states that the Foster Care Review Board (FCRB) recommended Sylvia have visitation with Diego and that two of her therapists agreed she was "ready to have visitation." She additionally claims that the sole care provider who believed visitation was not appropriate was Diego's therapist, and, relying on *Jordan C. v. Arizona Department of Economic Security*, 223 Ariz. 86, 219 P.3d 296 (App. 2009), asserts that "[t]he opinion of one therapist is insufficient to meet the clear and convincing standard required."

¶9 Sylvia overstates the recommendations made by her therapists and the FCRB. The FCRB's recommendation was extremely qualified, stating only that ADES should "consider arranging a visit between Diego and [Sylvia] so he can observe the changes she had made and possibly provide him with the opportunity for in person therapeutic clarification." Similarly, Sylvia's therapists did not generally recommend visitation, but more narrowly opined that Sylvia might be ready to see Diego in therapy. And one of those therapists acknowledged she had not previously recommended joint therapy because Sylvia continued to minimize her abusive conduct. Both of Sylvia's therapists acknowledged they had no opinion whether Diego was ready for such therapy. Diego's therapist strongly recommended against joint therapy, stating that, although Diego's therapy was focused on reunification, she would not force him to reunify with Sylvia and that forcing visitation could place Diego at risk of revictimization and his behavior would deteriorate. *See Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. at 376, 873 P.2d at 714 (although parent "entitled to reasonable visitation," court may deny visitation to prevent danger to "child's physical, mental, moral or emotional health").

¶10 Moreover, Sylvia misreads *Jordan C.* Nothing in that case suggests the opinion of a single therapist cannot, as a matter of law, be clear and convincing evidence. Indeed, the testimony of a single witness can be sufficient to meet the greater standard of proof beyond a reasonable doubt. *See State v. Montano*, 121 Ariz. 147, 149, 589 P.2d 21, 23 (App. 1978). And *Jordan C.* addressed an opinion far more qualified than that held by Diego's therapist. There, we determined that a single therapist's unproven "concern" was not clear and convincing evidence that providing reunification services would be futile. *Jordan C.*, 223 Ariz. 86, ¶ 21, 219 P.3d at 304. Here, as we have described, no therapist recommended joint therapy, much less "visitation" as Sylvia suggests, and Diego's therapist opined that visitation and/or joint therapy would be harmful to Diego. Thus, we find no error in the juvenile court's implicit determination that the reunification services provided by ADES need not have included visitation.

¶11 Sylvia next suggests that termination of her parental rights was "premature," relying on *In re Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571, 869 P.2d 1224 (App. 1994). There, we noted that parents who have complied with treatment plans "will not be found to have substantially neglected to remedy the circumstances that caused out-of-home placement, even if they cannot completely overcome their difficulties." *Id.* at 576, 869 P.2d at 1229. But that case addressed termination on time-in-care grounds pursuant to § 8-533(B)(8)(a) and has no relevance to either ground alleged and found here. Sylvia identifies no basis for us to conclude that termination of her parental rights in these circumstances was premature.

¶12 Finally, Sylvia asserts the juvenile court erred in concluding termination of her parental rights was in Diego's best interests. Her argument depends entirely on her

claim that she was entitled to visitation, a claim we have already rejected. Accordingly, we do not address this argument further.

¶13 For the reasons stated, the juvenile court's order terminating Sylvia's parental rights to Diego is affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge