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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JUANA M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, S.R., and L.R., Appellees.	2 CA-JV 2013-0028 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD200500164R

Honorable Kevin D. White, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Juana M., biological mother of S.R., born in August of 1999, and L.R., born in January of 2009, challenges the juvenile court's order terminating her parental rights to the children on the grounds of mental deficiency and length of time in court-ordered care, pursuant to A.R.S. § 8-533(B)(1) and (B)(8)(c), respectively. Juana also maintains the court abused its discretion in finding termination of her parental rights and adoption of the children was in their best interests. She asserts the Arizona Department of Economic Security (ADES) "failed to provide [her] with necessary services . . . to allow for reunification." We affirm for the reasons stated below.

¶2 When reviewing an appeal from an order terminating a parent's rights, we view the evidence in the light most favorable to sustaining the juvenile court's ruling. *Lashonda M. v. Ariz. Dep't of Econ. Sec*., 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Thus, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings." *Jesus M. v. Ariz. Dep't of Econ. Sec*., 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). That is, we will not disturb the ruling unless the factual findings are clearly erroneous. *Id*.

¶3 Viewed in the appropriate light, the evidence presented during the three-day contested severance hearing between December 2012 and January 2013 established that this family, which included four other children—A.R., P.R., M.R., and B.R.—who are not the subject of this appeal and their father Bennigno R.,[1] had a lengthy involvement with ADES and Child Protective Services (CPS), a division of ADES. Reports that the

[1]Bennigno's parental rights to S.R. and L.R. were also terminated and his appeal from that order is pending in this court.

children were being neglected and abused and that the parents were abusing drugs and alcohol began in 1998. Juana pled guilty to child neglect in 2004 after then two-year-old A. R. was found at a park by himself. That same year, twelve-year-old P.R. reported she had been molested by her uncle, who subsequently admitted he had molested her. In September 2005, a Pinal County sheriff's deputy found A.R. walking on a highway at 3:00 in the morning in his underwear. They located the child's home, where they found S.R., then six years old, awake and in the care of an uncle, who was unconscious and apparently intoxicated. The CPS investigator reported the home was "in a state of squalor" and the children were filthy. Two other children had been left with the maternal grandmother, whose home was equally filthy and squalid.

¶4 The children were taken into protective custody on September 16, 2005, and ADES filed a dependency petition. At the initial dependency hearing on September 21, Juana submitted the issue of dependency to the court, which adjudicated the children dependent as to her. A variety of services designed to reunify the family were provided to Juana and her family. In August 2006 the court found Juana had complied with the case plan and dismissed the dependency. But in October 2009, ADES again took the children into protective custody and filed a dependency petition after reports that they were being neglected and S.R. and P.R. had been molested by family members.[2] In

[2]P.R. gave birth to a child nine months after she was sexually abused by the paternal uncle.

February 2010, Juana and Bennigno submitted the issue of dependency to the court; again the court adjudicated the children dependent.[3]

¶5 In May 2011, ADES filed a motion to terminate the parents' rights to M.R., S.R., A.R., and L.R. on the grounds of length of time in court-ordered care and mental deficiency.[4] After a four-day severance hearing between October 2011 and February 2012, the court found ADES had established the two grounds existed for terminating the parents' rights and although ADES had made "reasonable efforts to provide [the parents] with rehabilitative services," the parents had not benefitted from those services and additional services would be futile. But, the court found ADES had not sustained its burden of establishing that termination as to S.R. and L.R. was in the children's best interests "[i]n light of the bond they share[d] with their parents." The court set the matter for a permanency hearing as to S.R. and L.R. Thereafter, ADES continued to provide Juana a plethora of services consistent with the court's May 2012 order regarding reasonable efforts and the permanency plan.

¶6 In August 2012, ADES filed a second motion to terminate the parents' rights as to S.R. and L.R. on the same grounds previously alleged. Evidence presented at the three-day hearing established the foster mother with whom the children had been living intended to relocate to North Carolina and wanted to adopt the children and take them with her. The foster mother testified she could not serve as a placement for the

[3]Because P.R. had reached the age of majority, the adjudication did not include her.

[4]M.R. was subsequently stricken from the proceeding because she did not wish to be adopted.

children if the court were to order a guardianship or other solution short of termination of the parents' rights because she needed the permanency of adopting the children and assuming full responsibility for them. Taking the matter under advisement, the court granted ADES's motion and terminated the parents' rights. The court found ADES had sustained its burden of proving the two statutory bases for terminating Juana's parental rights. It also concluded termination was in the children's best interest, entering specific, thorough factual findings upon which it based that conclusion.

¶7 Among the juvenile court's findings related to the children's best interests was that there was no "reasonable prospect" that the children could be returned to the parents' care. The court found that even though the children were bonded to their parents, the law did not offer a solution for this situation and on balance, it was in their best interests to terminate the parents' rights so that the foster mother could adopt them, even if they did move to another state. The court found that removing them from their foster mother's care would be more damaging, given how bonded they were to her and the outstanding job she had done addressing the children's special needs and issues. This appeal followed the court's entry of a final order.

¶8 We address the second issue Juana raises on appeal first. She claims ADES did not provide her with the "necessary services to allow for reunification." Apparently referring to the former version of § 8-533(B)(8)(a), which previously was numbered as § 8-533(B)(6)(a), *see* 1988 Ariz. Sess. Laws, ch. 50, § 1; 2008 Ariz. Sess. Laws, ch. 198 § 2, Juana contends that a parent will not be regarded as having substantially neglected to remedy the circumstances that caused a child to remain out of the home pursuant to court

order if the parent has made appreciable, good-faith efforts to comply with the case plan, even if the child has been out of the home for over a year. And, she asserts, after the juvenile court denied ADES's first motion to terminate her rights, it ordered ADES to prepare a new case plan for permanency, but ADES simply provided services similar to those provided under the old case plan.

¶9 ADES has a statutory obligation to make reasonable efforts to reunify the family. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 19, 219 P.3d 296, 303 (App. 2009). In determining that severance is appropriate, the juvenile court must consider the availability of reunification services to the parent and the parent's participation in the services and must find that ADES made a diligent effort to provide those services. A.R.S. § 8-533(B)(8), (D); *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 235, ¶ 14, 256 P.3d 628, 632 (App. 2011). But, ADES "is not required to provide every conceivable service or to ensure that a parent participates in each service it offers." *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). It is only required to provide the parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for their children. *Mary Ellen C. v. Ariz. Dep't Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999). ADES satisfies its duty when it provides the parent with the type of therapy that offers the most hope for enabling that parent to carry out her parental responsibilities. *Maricopa Cnty. Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 189, 692 P.2d 1027, 1038 (App. 1984). And ADES is not required to provide services

that are futile. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 15, 83 P.3d 43, 49 (App. 2004).

¶10 The juvenile court found that ADES

> ha[d] made diligent efforts to provide appropriate reunification to both parents, including psychological evaluations, visitation, counseling, parenting classes, substance abuse treatment, and urinalysis testing. Mother and Father have failed to benefit from these services in terms of resolving the underlying concerns regarding their ability to adequately parent, and they have been unable to remedy the circumstances that cause the children to be in an out-of-the home placement.

¶11 The juvenile court repeatedly found throughout the dependency, and when it denied ADES's first motion to terminate the parents' rights, that ADES had been making diligent efforts to provide appropriate reunification services. Juana did not challenge those findings and the case manager testified Juana did not request additional or different services than those with which she was being provided, at least not to his knowledge before he took over the case in March 2012, but certainly never after he became case manager. Nor did any providers request additional or different services be provided. We agree with ADES Juana waived the right to challenge the appropriateness of the services ADES had provided. As ADES points out, this court stated in *Christina G.* that a parent who does not challenge these findings and does not request a hearing on the kinds of services being provided, can be regarded as having waived the issue on appeal. 227 Ariz. at n.8, 256 P.3d at 632 n.8.

¶12 Even if not waived, Juana's argument lacks merit. First, as a sub-issue to the challenge of services provided, Juana contends a parent is not to be regarded as

having substantially neglected to remedy the circumstances that caused a child to remain out of the home pursuant to court order if the parent has made appreciable, good-faith efforts to comply with the case plan, even if the child has been out of the home for over a year. She suggests that she had made such efforts here. But the principle Juana is arguing and the case she relies on to support it, *In re Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 869 P.2d 1224 (App. 1994), relate to terminations under § 8-533(B)(8)(a). There, we said that parental rights may be terminated if "[t]he child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order . . . and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement." Here, Juana's rights were terminated pursuant to § 8-533(B)(8)(c), and that subsection does not require a showing of substantial neglect or willful refusal to remedy the circumstances that caused the child to remain out of the home. Rather, it states a parent's rights may be terminated if the child has been out of the home pursuant to court order for fifteen months or longer and "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." § 8-533(B)(8)(c). Thus, we need not address this argument further.

¶13 Second, with respect to what is essentially a challenge to the sufficiency of the evidence supporting the juvenile court's finding that ADES had diligently provided appropriate reunification services, even if not waived, the record contains reasonable

evidence to support that finding. In its termination order, the court identified the services ADES had provided. As ADES noted, before the court denied the first motion to terminate the parents' rights, it had provided Juana with supervised visitation, parent-aide services, parenting classes, domestic violence education, anger-management classes, substance abuse treatment, individual counseling, and a psychological evaluation. Although psychologist Carlos Vega testified at the first severance hearing that providing Juana with additional services would be futile, ADES nevertheless continued to provide her with individual counseling, joint counseling with Bennigno, parenting classes, supervised visitation, parent-aide services, and both employment and wellness programs, after the first hearing. The children were provided behavioral case management, counseling, medication management, transportation, parent-aide services for the children, psychological evaluations, and developmental disabilities services. Juana concedes and the record shows that by the time of the severance hearing, the mental health professionals and case manager believed additional services would be futile.

¶14 We also reject Juana's claim that there was insufficient evidence to support the juvenile court's conclusion that termination of her rights was in the children's best interests. Juana focuses primarily on the foster mother's plan to adopt the children and move them to North Carolina, claiming such a change "can hardly been in [S.R.'s] best interests," particularly because S.R. does not like change. She also points to evidence that the children have special needs and are bonded with their mother and their siblings, including then seventeen-year-old M.R. who was living with them, inferring these factors were contrary to the court's best-interests finding.

¶15 Before terminating a parent's rights, the juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and that a preponderance of the evidence establishes termination of the parent's rights is in the child's best interest. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). To establish termination of Juana's rights was in the best interests of S.R. and L.R., ADES was required to show the children "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). Among the factors relevant to this determination is whether a current plan for the children's adoption exists. *Mary Lou C.*, 207 Ariz. 43, ¶ 19, 83 P.3d at 50. The juvenile court may also consider whether the current placement is meeting the children's needs. *See In re Maricopa Cnty. Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994). And, it may take into account that "[i]n most cases, the presence of a statutory ground will have a negative effect on the children." *In re Maricopa Cnty. Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988) (best interests separate from specific statutory grounds for severance and may be basis for denying motion or petition for termination).

¶16 Here, the juvenile court's conclusion that termination was in the children's best interests was preceded by thorough, specific factual findings for which there is ample support in the record. That evidence includes the testimony of CPS case managers (also referred to as child protective services specialists), therapists, and the parents, and numerous exhibits admitted at the hearing. For example, the current case manager

testified termination was in the children's best interests because they needed real permanency, which a guardianship could not provide. Similarly, psychologist Al Silberman, whose February 21, 2012, and April 11, 2012, reports were admitted into evidence at the hearing, testified he had conducted a bonding assessment or "best interest" evaluation of S.R. and L.R. He stated L.R. was more bonded to her foster mother than her biological mother, and concluded it would be in L.R.'s best interest to remain with the foster mother. He explained L.R. was developmentally delayed as a result of neglect, which included having been left in a swing for hours on end, and would need "a lot of physical therapy . . . [and] a lot of consistency in her life." He believed severance of the parents' rights and adoption of L.R. by her foster mother was in her best interest if she "is to have a chance to survive in this world with low functioning and some physical limitations."

¶17 Silberman testified further that he did not believe continued contact between L.R. and her biological parents was "necessary for her mental and emotional [well] being," explaining that L.R.'s family consisted of the family created by her foster mother and the foster mother's sister, who was also involved with the children. Silberman stated the prospect of the foster mother's relocation to another state with the children did not change his opinion about their best interests because the home with the foster mother "is so much more of a stable place than what she's going to get from this family[,] who doesn't really deal effectively with their children, has many problems, many problem children." His opinion was essentially the same with respect to S.R. as it was for L.R. He believed she, too, should remain in the care of her foster mother, noting

her developmental delays and other difficulties, including emotional challenges because of having been molested. He noted that her behavior had improved significantly because of the structured environment provided by the foster mother. And, he opined, if S.R. were to have no contact with her biological parents, it would not cause her "significant harm" or be a "major detriment."

¶18 Although Silberman believed it would be best if S.R. could have regular contact with her biological parents, he nevertheless concluded the best option was adoption of the children by the foster mother, even if she did leave the state. He felt it would be detrimental to both children if they were to be removed from the foster mother's care. When asked whether he thought family reunification was a "viable option" for S.R. and L.R., he said, "No."

¶19 The foster mother's testimony also supported the juvenile court's best-interest findings. She testified thirteen-year-old S.R. had been placed with her in July 2008, and three-year-old L.R. in March 2011. She stated she loves them, has cared and provided for them, and wants to adopt them. She testified further, "they have been with me for so long and they feel safe around me, and I love them dearly as my own. And I just want them to have a safe environment, loving environment, and to be able to be successful for the future." She agreed permanency was the most important thing to S.R., and described the children's special physical and cognitive disabilities and needs and how she addresses them, including the services they require, which she makes sure they receive.

¶20 The foster mother testified she was committed to allowing the children continued contact with their parents. But, she admitted, her plan was to move to North Carolina to be with her mother and help care for her when needed. She planned to take S.R. and L.R. with her if she could adopt them, insisting she would still allow them continued telephonic or other contact with their parents any time. She stated she would not want custody of the children under a guardianship, explaining she wanted to be entirely responsible for them; she did not want to be required to return to Arizona or to be concerned about the input of anyone else. She explained she wanted to establish a life for herself and the children in North Carolina with her own mother.

¶21 The juvenile court's order reflects that it carefully considered the complex issues involved in determining what was in the children's best interests. As we stated, it made specific factual findings in this regard, noting the competing interests at play. The court acknowledged the bond that existed between the children and their parents, but weighed that against the bond between them and the foster mother. Clearly, the court found the foster mother's testimony believable and compelling. The court noted the difficulty posed by the foster mother's plan to relocate. Ultimately, however, the court weighed the evidence, exercising its discretion soundly. It determined the children's best interests would be served by terminating the rights of their parents so they could be adopted by a loving, caring foster mother with whom they had been living for quite some time, someone the court believed would give the children the permanency, stability, and the special care the court found they needed.

¶22 The juvenile court, not this court, is "in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). Consequently, we will not reweigh the evidence or substitute our judgment for that of the juvenile court. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. Juana essentially is asking us to reweigh the evidence that was before the juvenile court and urges us to reach a different conclusion about the children's best interests. This we will not do. Rather, we find there was more than reasonable evidence to support the court's findings and therefore adopt its ruling. *See id.* ¶ 16, *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶23 For the reasons stated herein, we affirm the juvenile court's order terminating her parental rights to S.R. and L.R.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge