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

FILED BY CLERK

OCT 25 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                                   |                            |
|-----------------------------------|----------------------------|
| ARIZONA DEPARTMENT OF ECONOMIC )  | 2 CA-JV 2013-0062          |
| SECURITY, )                       | DEPARTMENT A               |
| )                                 |                            |
| Appellant, )                      | <u>MEMORANDUM DECISION</u> |
| )                                 | Not for Publication        |
| v. )                              | Rule 28, Rules of Civil    |
| )                                 | Appellate Procedure        |
| PEGGY M., WILLIAM F., and A.M., ) |                            |
| )                                 |                            |
| Appellees. )                      |                            |
| _____ )                           |                            |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J199635

Honorable Christopher Staring, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 The Arizona Department of Economic Security (ADES) challenges the juvenile court's order of May 22, 2013, denying ADES's motion to terminate the parental rights of Peggy M. and William F. to their child, A.M. ADES maintains the trial court abused its discretion in "reversing its previous orders" allowing ADES to amend its termination motion as to William and in determining ADES had not provided Peggy with sufficient reunification efforts.

¶2 When reviewing an appeal from an order denying a motion to terminate a parent's rights, we view the evidence in the light most favorable to sustaining the juvenile court's ruling. *See 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 In September 2011, Child Protective Services (CPS), a division of ADES, received a report that then four-year-old A.M. had been found "outside and unsupervised." Staff members and a resident of the apartment complex in which Peggy lived with her husband Michael reported having seen A.M. outside alone on other occasions as well. Peggy tested positive for marijuana use that same month. In October 2011, A.M. was found barefoot, dirty, and alone at a shopping center down the street from Peggy's apartment. Her home was "observed to be unsafe due to excessive piles of

clutter.” CPS took A.M. in temporary custody at the end of October, and shortly thereafter Peggy was “severely injured in a domestic violence altercation” with Michael, with whom she had a history of domestic violence.

¶4 The juvenile court found A.M. dependent as to Peggy after she failed to appear at a settlement conference. It also found A.M. dependent as to William, whom Peggy had indicated was A.M.’s biological father, after he admitted the allegations in an amended dependency petition. William was served at the Pima County Jail, and he apparently remained incarcerated throughout the proceedings.

¶5 In November 2012, ADES filed a motion to terminate Peggy’s and William’s parental rights alleging A.M. had been in an out-of-home, court-ordered placement for nine months or longer. *See* A.R.S. § 8-533(B)(8)(a). ADES indicated it had offered various services to both parents, but that Peggy had been unable to “participate in a psychological evaluation” because “[s]he was unable to remain sober for 30 days.” And ADES indicated that William had “missed two scheduled DNA testing appointments” to establish his paternity of A.M.

¶6 The juvenile court held an initial severance hearing on December 20, 2012, and at that time granted ADES’s motion to amend its motion “to reflect the ground of [l]ength of [t]ime in [c]are, 15 months or longer.” On January 17, 2013, ADES filed an amended motion for termination, alleging not only the fifteen-months ground the court had allowed, but, as to William, that he had “failed to file a notice of claim of paternity.” *See* § 8-533(B)(6), (B)(8)(c). On the first day of the contested severance hearing on February 1, William objected to the amendment, but the court granted the state’s motion

to add the paternity-claim ground. Counsel for ADES and A.M. made opening statements, but no testimony was given at the first day of the hearing. A month later, on the second day of the continued hearing, the state again sought to amend its petition for termination to add the ground of abandonment as to William. *See* § 8-533(B)(1). In response, William’s counsel stated: “[O]bviously, I have time to prepare. It is common for us to amend proceedings to conform with the evidence. I don’t think they will prevail on that charge.” The court granted the motion, and the hearing continued. After the fourth day of the hearing, held on April 3, the court took the matter under advisement.

¶7 In its under-advisement ruling, issued on May 22, 2013, the juvenile court denied ADES’s motion to terminate William’s parental rights on the amended grounds of abandonment and failure to establish paternity, citing *Roberto F. v. Arizona Department of Economic Security*, 232 Ariz. 45, 301 P.3d 211 (App. 2013), which was filed while this matter was under advisement. *Roberto F.* concluded the juvenile court had erred by allowing abandonment to be added as a ground for severance on the fourth day of a five-day trial. The juvenile court then concluded ADES had not made “a diligent effort to provide appropriate reunification services,” § 8-533(B)(8), to Peggy because it had failed to provide her with a psychological evaluation despite clear indications of psychological problems, or to William.

¶8 On appeal, ADES argues first the juvenile court abused its discretion in denying its motion to terminate William’s parental rights on the amended grounds alleged. ADES maintains the court interpreted *Roberto F.* incorrectly and abused its discretion by implicitly determining William’s due process rights were violated by the

late amendments to the motion to terminate. “We review a trial court’s denial of a motion to amend a complaint for an abuse of discretion.” *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 231 Ariz. 517, ¶ 4, 297 P.3d 923, 925 (App. 2013).

¶9 Rule 15, Ariz. R. Civ. P., on which ADES relies, provides various grounds for amendment of a party’s pleading. A pleading may be amended “as a matter of course,” either within twenty-one days of service of the pleading or of a responsive pleading under Rule 15(a)(1). “Otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party.” Ariz. R. Civ. P. 15(a)(1). Such leave is to “be freely given when justice requires.” *Id.* Likewise, a party may amend its pleadings “as may be necessary to cause them to conform to the evidence” when “issues not raised by the pleadings are tried by express or implied consent of the parties.” Ariz. R. Civ. P. 15(b). Absent such consent, the pleadings may be amended “when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party’s action or defense upon the merits.” *Id.*

¶10 The record here shows that William consented to the amendment of the motion to terminate his parental rights to include the ground of abandonment. William maintains that counsel’s statement on the issue “only indicates . . . confidence as to prevailing on that issue and does not constitute an opinion as to the propriety of the amendment.” But, as detailed above, counsel indicated William would not be prejudiced and she had sufficient time to prepare. Therefore, we cannot say William met the standard for showing prejudice arising from the amendment set forth in Rule 15(b). And,

even if Rule 15 does not apply, as William suggests, one's due process right to notice may be waived. *See Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, ¶ 9, 156 P.3d 430, 434 (App. 2007); *State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992). By agreeing to the amendment, William did so here.

¶11 William maintains, however, that we may affirm the juvenile court's denial of ADES's motion for termination on the abandonment ground because "the facts of the case support the denial of the Motion" and we generally may affirm on any basis. *See Melendez v. Hallmark Ins. Co.*, 232 Ariz. 327, ¶ 9, 305 P.3d 392, 395 (App. 2013). But the court, as the trier of fact, is in a better position to weigh the evidence presented at the severance hearing. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Therefore, in this context, remand to the juvenile court for a determination in the first instance is appropriate.

¶12 ADES also contends the juvenile court erred in determining it had not made diligent reunification efforts as to Peggy. We review a juvenile court's decision as to whether the grounds for severance have been established for an abuse of discretion and will affirm its ruling so long as reasonable evidence supports it. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009).

¶13 As ADES acknowledges, it has a statutory obligation to make reasonable efforts to reunify the family. *Id.* ¶ 19. 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. § 8-533(B)(8), (D); *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, ¶ 14, 256 P.3d 628, 632 (App. 2011).

¶14 But, as ADES correctly argues, 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). 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). It is, however, required to provide the parent with the time and opportunity to participate in programs designed to improve the parent’s ability to care for her children. *Mary Ellen C. v. Ariz. Dep't Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999). In this case, the juvenile court determined ADES had not provided such an opportunity because it found ample evidence that Peggy required mental health care, but ADES had not given her a psychiatric evaluation due to her failure to establish thirty days of sobriety.

¶15 ADES maintains the juvenile court “incorrectly interpreted the diligent-efforts” standard and asserts that we should review the matter de novo. But, the court’s thorough discussion of this issue in its under-advisement ruling makes clear that it properly applied the legal standard. ADES’s argument amounts to a request that we reweigh the evidence relating to the services provided to Peggy; that we will not do. *See Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945 (juvenile court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts”). There was reasonable evidence to support the court’s determination that ADES had failed to meet the statutory standard, and we therefore affirm.

¶16 For the reasons above, the judgment of the juvenile court is affirmed as to its denial of ADES's motion to terminate Peggy's and William's parental rights on § 8-533(B)(8) grounds. Due to our resolution of these grounds, we need not address the alternative, paternity-claim ground in relation to William's rights. The court's judgment is vacated as to its denial of ADES's motion to terminate William's parental rights on the grounds of abandonment, and the matter is remanded to the juvenile court for further proceedings consistent with this decision.

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

CONCURRING:

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

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge\*

\*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Administrative Order No. 2012-101 filed December 12, 2012.