IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

C.B.,
Appellant,

v.

KRYSTLE B. AND REUBEN B.,
Appellees.

No. 2 CA-JV 2015-0021
Filed June 8, 2015

Appeal from the Superior Court in Pima County
No. JD196105
The Honorable Jane Butler, Judge Pro Tempore

AFFIRMED

COUNSEL

Pima County Office of Children's Counsel,
By Edith A. Croxen, Chief Counsel, Tucson
Counsel for Appellant

Arizona Children's Law, LLC, Tucson
By Patrick Lacroix
Counsel for Appellee Reuben B.

Law Office of Cynthia D. Ettinger, P.C., Tucson
By Cynthia D. Ettinger
Counsel for Appellee Krystle B.

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 C.B., born in February 2012, appeals from the juvenile court's order denying the motion to terminate the parental rights of her parents, Krystal B. and Reuben B., filed by the Department of Child Safety (DCS).[1] We affirm for the reasons that follow.

Factual and Procedural Background

¶2 C.B. was born exposed and addicted to methadone, which Krystal was taking while pregnant as part of a drug treatment program. She also was exposed to other drugs. C.B. remained in the hospital for two months and was treated with morphine. In April 2012, C.B. was released from the hospital and placed in foster care. DCS filed a dependency petition as to both parents based on Krystal's history of substance abuse; the termination of her rights to an older sibling earlier that month; domestic violence with Reuben;

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[1] The juvenile court substituted DCS for the Arizona Department of Economic Security (ADES), which investigated the case initially and filed the dependency petition and the motion to terminate parental rights. For simplicity, our references to DCS in this decision encompass ADES, which formerly administered child welfare and placement services under title 8, and Child Protective Services, formerly a division of ADES. *See* 2014 Ariz. Sess. Laws 2d Spec. Sess., ch. 1, §§ 6, 20, 54.

Reuben's failure to protect C.B. from Krystal's substance abuse; and Reuben's own substance abuse, mental illness, registered sex offender status, and criminal history. The court adjudicated C.B. dependent as to both parents in June 2012 after they admitted allegations in an amended dependency petition.

¶3 Krystal and Reuben received a panoply of services designed to reunify the family and address C.B.'s special medical needs, including drug screenings, parenting classes, relapse prevention programs, marriage counseling, and psychological evaluations. Nevertheless, C.B. remained out of the home and in January 2014, the juvenile court granted DCS's request to change the case plan goal from reunification to severance and adoption. DCS filed a motion to terminate the parents' rights pursuant to A.R.S. § 8-533(B)(8)(c), and, as to Krystal, based on neglect or willful abuse, pursuant to § 8-533(B)(2). On September 5, 2014, the twelfth day of a thirteen-day severance hearing that began in April 2014 and ended in October, the court granted Krystal's motion to dismiss the latter ground. After the parties filed written closing arguments, the court denied DCS's motion in a January 12, 2015 under-advisement ruling. This appeal by C.B. followed.[2]

¶4 The juvenile court may terminate a parent's rights pursuant to § 8-533(B)(8)(c) if it finds the record contains clear and convincing evidence that the child has been out of the home pursuant to court order for fifteen months or longer, the parent has not been able to remedy the circumstances that caused the child to remain out of the home, and there is a substantial likelihood that the parent will not be capable of safely parenting the child in the near future. *See also* A.R.S. §§ 8–537(B), 8-863(B). The court must also find that a preponderance of the evidence established termination of the parent's rights is in the child's best interest. §§ 8–533(B), 8–

[2]DCS filed a notice in this court stating it did not appeal the juvenile court's order and would not be participating in the appeal. Reuben filed an answering brief and Krystal filed a notice of joinder in that brief.

537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶5 It was undisputed at the termination hearing that at the time DCS filed its motion, in January 2014, C.B. had been out of the home for more than twenty months. The severance hearing was conducted between April 2014 and October 2014 and the parties submitted written closing arguments in November; thus, another twelve months passed between the filing of the motion and the court's entry of its under-advisement ruling in January 2015. In its ten-page ruling, the juvenile court quoted § 8-533(B)(8)(c) and found "[t]he sole issue" in the proceeding was whether there was "'a substantial likelihood that [these] parents will not be capable of exercising proper and effective parental care and control' of their special-needs child in the near future." The court summarized the history of the case and the evidence presented regarding the services the parents received, C.B.'s special needs, the parents' compliance with the case plan and medical providers' directions as well as their failure to follow directions at times.

¶6 The trial court entered extensive factual findings, noting DCS and, in particular, child safety specialist Wendy Williamson, had "provided extraordinary services to help reunify the parents with [C.B.]," and finding the parents had "been persistent and diligent in attending services and visitation to the best of their ability." The court summarized additional evidence and described C.B.'s needs and the parents' abilities to fulfill those needs, ultimately concluding they could, at that time, "provide a safe, stable and nurturing home to [C.B.]." The court denied DCS's motion, increased the parents' visitation, and ordered DCS to formulate a transition plan for transition to be accomplished no later than February 10, 2015.

Discussion

¶7 C.B. argues the juvenile court erred by considering "progress, if any, by the parents toward reunification after the filing of the termination [motion]." She asserts that in deciding whether the parents would be able to parent her in the near future, the court

erroneously "defined and assessed 'near future' from the time of the court's ruling—twelve months after the motion for termination was filed and fifteen months after C.[B.]'s case reached the statutory time-frame provided in § 8-533(B)(8)(c)." C.B. acknowledges she did not raise this argument below. But, relying on *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶¶ 22-23, 118 P.3d 37, 42 (App. 2005), she asserts the issue is subject to review for fundamental error, and suggests the court committed such error by misconstruing and incorrectly applying the statute.

¶8 Because of the various constitutional rights of the defendant that are implicated in criminal proceedings, the fundamental-error principle is largely a criminal law principle. *See generally State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). As this court observed in *Monica C.*, "'the doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations [that] deprive[] a party of a constitutional right.'" 211 Ariz. 89, ¶ 23, 118 P.3d at 42, *quoting Bradshaw v. State Farm Mut. Auto. Ins.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (alterations in *Monica C.*); *see also Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (doctrine of fundamental error used sparingly, if at all, in civil cases).

¶9 In *Monica C.*, however, this court only addressed the constitutional interests of parents that are implicated in severance proceedings. Although the interests of children in severance proceedings are significant, and may even be characterized as constitutional, *see e.g., Santosky v. Kramer*, 455 U.S. 745, 761 (1982); *Kent K.*, 210 Ariz. 279, ¶ 37, 110 P.3d at 1021, we need not decide whether the fundamental error doctrine applies because we find no error. *See Monica C.*, 211 Ariz. 89, ¶¶ 24-25, 118 P.3d at 42-43 (party claiming error must "'show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial'"), *quoting Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. The relevant circumstances to be considered under § 8-533(B)(8)(c) are those that exist at the time of the severance. *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007); s*ee also Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, ¶ 8, 117

P.3d 795, 797 (App. 2005) (we apply plain, unambiguous statutory language as written because it is the best indicator of legislature's intent); *In re Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 467, 857 P.2d 1317, 1321 (App. 1993) (legislature's use in severance statute of present tense in referring to "circumstances that cause" child to remain out of home in court-ordered care reflects intent that court consider circumstances at time of severance), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, 110 P.3d 1013.

¶10 Thus, in order to terminate a parent's rights pursuant to § 8-533(B)(8)(c), the juvenile court must find, based on clear and convincing evidence, *see* § 8–537(B); *Kent K.*, 210 Ariz. 279, ¶ 7, 110 P.3d at 1015-16, that not only has the child been in court-ordered care for fifteen months or longer, a fact that was not disputed here, but "there is," at the time of the severance, "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). The juvenile court found the evidence presented during the lengthy hearing fell short of proving this element of the statute. Its ruling shows that after considering all of the relevant evidence, it found Krystal and Reuben could properly care for C.B. immediately, after a reasonable period of transitioning C.B. into their custody. Nothing in the statute or the case law supports the notion that parents' conduct after the motion to sever is filed cannot be considered in determining whether the parent is likely to be able to properly parent in the near future.

¶11 At the end of its thorough under-advisement ruling, the juvenile court stated that because DCS had not proven the statutory ground for terminating the parents' rights, it would not address the question whether termination was in C.B.'s best interest. C.B. argues the court erred in failing to enter findings regarding her best interest nevertheless. She also argues that even if not required, the court should have made findings reflecting that it had considered her health and safety before returning her to her parents, in accordance with A.R.S. § 8-847 and 42 U.S.C. § 675(5)(C)(iii). We disagree for several reasons.

¶12 First, C.B. waived the request for additional findings by failing to ask the juvenile court to make them before appealing. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) ("[A] party may not 'sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal that mere lack of a finding on that critical issue as a grounds for reversal.'"), *quoting Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 26 Ariz. App. 265, 271, 547 P.2d 1065, 1071 (1976). Second, and in any event, having found DCS did not sustain its burden of proving the elements of § 8-533(B)(8)(c), there was no need for the court to make findings as to whether termination was in C.B.'s best interest. *See Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶¶ 17, 37, 219 P.3d 296, 303, 308 (App. 2009) (DCS's failure to sustain its burden on any of the elements of § 8-533(B)(8)(c) requires denial of motion to terminate).

¶13 Nor are we persuaded the juvenile court was required to make findings under § 8-847. This was a severance hearing, not a dependency review hearing. *See* § 8-847 (concerning periodic review hearings held following dependency adjudication and disposition hearings). The court addressed the issues that were before it and made the necessary findings. Moreover, the court confirmed that a dependency review hearing was to be held just four weeks later, on February 11, 2015. The issue is not only waived, but presumably moot.

Disposition

¶14 The juvenile court's order denying DCS's motion to terminate Krystal's and Reuben's parental rights to C.B. is affirmed.