IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KEILYNN K.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND Z.S.,
Appellees.

No. 2 CA-JV 2015-0051
Filed August 31, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD191329
The Honorable Jennifer P. Langford, Judge Pro Tempore

AFFIRMED

COUNSEL

Remick West-Watt, PLC, Tucson
By Nicholas Brereton and Ivan S. Abrams
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Erika Z. Alfred, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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 Keilynn K. appeals from the juvenile court's order terminating her parental rights to Z.S., born in June 2009, based on length of time in court-ordered care pursuant to A.R.S. § 8-533(B)(8)(c). She contends there was insufficient evidence to support the court's finding that the Department of Child Safety (DCS) sustained its burden of proving the elements of the statute with clear and convincing evidence and DCS did not fulfill its obligation, statutory or constitutional, of making every effort to preserve her relationship with Z.S. We affirm for the reasons stated below.

Factual and Procedural History

¶2 Z.S. was initially removed from Keilynn's home shortly after he was born and was adjudicated dependent in August 2009 after Keilynn admitted allegations in an amended dependency petition. Keilynn was provided a plethora of services, including drug screenings, psychological and neuropsychological evaluations, individual and bonding-and-attachment therapy, parenting classes, and parent-aide services, including in-home training, family support partner and supervised visitation. The juvenile court dismissed the dependency in November 2011. In October 2012, Z.S. was removed from the home a second time, as was his half-brother, I.A., born in February 2012. DCS had received reports that day-care personnel had found bruises on Z.S., and I.A. often arrived in his pajamas with a dirty diaper. The children were returned the next day after a doctor concluded Z.S.'s bruises were "from natural causes." But the children were removed again about two weeks later when more bruises were found on various parts of Z.S.'s body, including a handprint on his right leg. DCS filed a dependency petition based on abuse and neglect, as well as the continued risk for both. The

children were adjudicated dependent as to both parents in April 2013 after Keilynn admitted allegations in an amended petition. I.A. was returned to Keilynn's care and the court outlined the plan for the return of Z.S.

¶3 DCS provided Keilynn with a variety of services over the ensuing months. By October 2013, Keilynn had only partially complied with the case plan and had not benefitted sufficiently from the services in order for Z.S. to be returned to her care. After a permanency hearing in October 2013, the juvenile court concluded that, despite DCS's reasonable efforts to achieve the case-plan goal of reunification, Z.S. could not be returned to Keilynn's care without substantial risk of physical or emotional harm. It ordered a concurrent case-plan goal of reunification and severance and adoption. In March 2014, DCS filed a motion to terminate Keilynn's parental rights to Z.S pursuant to § 8-533(B)(8)(c).

¶4 The juvenile court granted DCS's motion after a contested severance hearing that took place over seven days between May 2014 and December 2014. In its six-page ruling, the court reviewed the history of this case during the two dependency proceedings and summarized the services DCS had provided to Keilynn and Z.S. The court entered specific factual findings and concluded DCS had sustained its burden of proving the elements of the statute with clear and convincing evidence and had established by a preponderance of the evidence that termination of Keilynn's parental rights to Z.S. was in the child's best interest. This appeal followed.

Discussion

¶5 We will not disturb the juvenile court's order terminating parental rights unless the court abused its discretion. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 8, 83 P.3d 43, 47 (App. 2004). We view the evidence in the light most favorable to upholding the order and if there is reasonable evidence in the record to support the factual findings upon which the order is based, we will affirm. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009). As the movant, DCS had the burden

of proving the elements of § 8-533(B)(8)(c) with clear and convincing evidence; it was also required to establish by a preponderance of the evidence that termination of Keilynn's parental rights was in Z.S.'s best interest. *See* A.R.S. §§ 8-533(A), (B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 22, 41, 110 P.3d 1013, 1018, 1022 (2005).

¶6 Relying primarily on *Mary Ellen C. v. Ariz. Dep't of. Econ. Sec.*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), and *Jordan C.*, 223 Ariz. 86, 219 P.3d 296, Keilynn contends the juvenile court erred in finding DCS had diligently provided her with appropriate reunification services required by the statute and by the federal constitution. Based on *Mary Ellen C.*, she asserts DCS had the burden of establishing not only that it had diligently provided appropriate reunification services, but also any additional services would have been futile. She contends DCS "absolutely failed in its obligation to make every effort to preserve the parental relationship when it did not" arrange for her to have visitation with Z.S. for eight months after the child was removed from the home, "issued conflicting recommendations for future services, and never provided the therapeutic visitations it recommended as necessary for reunification and was court ordered to provide."

¶7 The record belies Keilynn's contention that she was not permitted to visit Z.S. from October 2012, when he was removed from the home, until August 2013. Shortly after Z.S. was removed in October 2012, DCS began to offer Keilynn a variety of services, including supervised visitation with Z.S., both alone and together with I.A. DCS provided her with supervised visits with a parent aid for about seven months, beginning in December 2012 and ending when that service was "closed out" in July 2013 because of her lack of progress. Case manager Ana Aper testified at the severance hearing that when she received the case in April 2013, Keilynn had been receiving parent-aid visitation and parent-child-relationship therapy, which started in September, and had been participating in about six out of the eight visits each month. In April 2013, after the juvenile court placed I.A. in Keilynn's care again, she began arriving late to some of the parent-aide visits with Z.S., and cancelled others. Aper explained DCS was not able to renew the parent-aide services after they ended in July 2013 because after seven months of such

services, Keilynn had failed to progress and the provider rejected requests to renew the services.

¶8 Although the parent-aide visitation ended in July 2013, Keilynn was told in April that she could visit Z.S. six times each week at Casa de los Niños, where he had been placed in January 2013. Keilynn refused visitation initially and did not begin to visit Z.S. there until August. Keilynn blames Casa de los Niños and DCS for her lack of visitation at the shelter during this period. She asserts, for example, that the problems were "purely logistical" because of the rigid policy of Casa de los Niños to disallow parents to bring other children with them to visit a child and DCS's failure to arrange for her transportation there to visit Z.S. But Aper testified Keilynn was offered child care for I.A. and transportation to facilitate these visits; "she declined the transportation" and only accepted the child care for I.A. Thus, the record shows that Keilynn's rigidity in scheduling these visits impeded her visits with Z.S., not failures of Casa de los Niños or DCS. Additionally, after Z.S. was moved from Casa de los Niños in November 2013, DCS provided supervised visits.

¶9 Independent of her arguments that relate specifically to visitation, Keilynn argues DCS offered insufficient services generally to reunify her with Z.S. and asserts it "issued conflicting recommendations for future services." She seems to reiterate her previous arguments about visitation in this section of her brief but also asserts DCS did not do everything it could have done to reunify her with Z.S. These arguments are blended with the additional argument that DCS failed to provide therapeutic visitation, contrary to the juvenile court's order, and did not provide additional services that it failed to prove would have been futile. We therefore address these arguments together.

¶10 Whether statutorily or constitutionally mandated, DCS's duty to make reasonable efforts to reunify the family does not require it to "provide 'every conceivable service'" or "undertake rehabilitative measures that are futile." *Mary Ellen C.*, 193 Ariz. 185, ¶¶ 34, 37, 971 P.2d at 1053, *quoting In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994); *see*

also Mary Lou C. v. Ariz. Dep't of Econ. Sec., 207 Ariz. 43, ¶ 15, 83 P.3d 43, 49 (App. 2004). In deciding whether to terminate a parent's rights, the juvenile court must consider the availability of reunification services to the parent and the parent's participation in the services and must find DCS 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, ¶ 14, 256 P.3d 628, 632 (App. 2011). DCS 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 [her] child[ren]." *Mary Ellen C.*, 193 Ariz. 185, ¶ 37, 971 P.2d at 1053.

¶11 Neither these authorities nor the statute support Keilynn's assertion that DCS has the burden of proving not only that it made diligent efforts to provide reasonable reunification services but also that any conceivable service it did not provide would have been futile. DCS is only required to "undertake measures with a reasonable prospect of success." *Id.* ¶ 34. The juvenile court found DCS satisfied that burden and diligently provided Keilynn with appropriate reunifications services by providing various "assessments and multiple treatment modalities, including individual counseling over the course of two dependency cases totaling more than four years." We agree with DCS the record supports that finding, establishing that during the four years of two dependency proceedings, DCS provided Keilynn with "exhaustive services." It gave her abundant opportunities to remedy the circumstances that caused Z.S. to remain out of the home.

¶12 We reject Keilynn's related argument that DCS failed to comply with the juvenile court's order directing it to arrange therapeutic visitation and did not sustain its burden of proving therapeutic visitation would have been futile. Without citing to the record, Keilynn contends visits between Keilynn and Z.S. were stopped in May 2014 because of the child's behavioral issues and that the parent-child relationship therapist, Linnea Linde, recommended therapeutic visitation, which DCS never arranged. Also without support, she alleges the goal of reunification was modified from reunification to severance in September and October 2014 "apparently due to the inability of DCS to schedule therapeutic

visitation."[1] A close examination of the record[2] establishes Keilynn overstates the recommendation for therapeutic visitation and the juvenile court's related order, as well as its significance to the termination of her rights.

¶13 In the spring of 2014, Z.S. began to refuse to attend visits with Keilynn, physically resisting, engaging in tantrums, and displaying severe adverse emotional reactions to visits. He told his therapist he was afraid of being abused by his mother and refused to go. Contrary to Keilynn's assertion, this was two months after DCS filed the initial motion to terminate her parental rights, refuting her assertion that the case plan changed because of the lack of therapeutic visitation. During the first day of the severance hearing on May 15, 2014, Keilynn raised the issue of visitation and requested

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[1]Although we could summarily reject the arguments for her failure to cite the portions of the record that support it, Ariz. R. Civ. App. P. 13(a)(7) (requiring appellate brief contain citations to record and supporting legal authority to preserve issue for appellate review); Ariz. R. P. Juv. Ct. 106(A) (Rule 13 applicable to juvenile appeals), we have addressed them in any event, given her sporadic references to the record in other portions of her brief.

[2]In her reply brief, Keilynn asserts that DCS's answering brief "is littered with citations to Exhibits presented at trial. However these Exhibits are not in the Index of Record nor are they attached to the trial transcripts." She argues we should disregard DCS's citations to these exhibits "as they are unverifiable with the current Index of Record and mischaracterize the state of the evidence presented at trial." The record on appeal includes all "exhibits . . . introduced into evidence." Ariz. R. P. Juv. Ct. 104(D)(1)(c). The exhibits, which we have considered, are not part of the electronic record but were properly submitted to this court as part of the record on appeal and have been available for inspection by the parties and their counsel. The exhibits are clearly identified, as is whether they were admitted, which the transcripts confirm. Additionally, other exhibits were marked and identified and although not admitted, referred to by various witnesses during their testimony. The argument is meritless.

a hearing, which the court set for June 3, the time of the continued severance hearing. During the June 3 hearing, the parties discussed the issue and the court ordered DCS to arrange weekly visitation, directing Keilynn to "follow the visitation protocol and help the child to have an easier transition time back to the foster mother," and requiring the child's therapist, Linde, to provide the court with an update.

¶14 Keilynn subsequently filed a motion for contempt/motion to continue the severance hearing, alleging DCS was violating the June 2014 order. In its response, DCS explained it was trying to comply with the juvenile court's order but had been unable to do so because of Z.S.'s anxiety and distress at the prospect of visiting his mother. Specifically, he refused to enter the vehicle provided to transport him. This issue was discussed again on July 8, 2014, during the continued severance hearing. The method of transportation was changed: the foster parents were to transport Z.S. in an effort to alleviate his anxiety. The parties agreed and the court ruled that DCS was to contact Z.S.'s "therapist to implement therapeutic visitation between the mother and [the child], and the Department will work on getting transportation set up with the placement." The court further ordered DCS to implement therapeutic visitation once each week. At a dependency review/continued severance hearing on October 20, DCS requested that visitation be suspended until "[the] treatment team believes it would not be detrimental to the child to have visitation with his mother." The court ordered DCS to "continue to explore whether or not there is a therapy agency or an individual therapist who would be willing to work with the child to determine whether or not the visits with his mother are in his best interests."

¶15 DCS tried to arrange therapeutic visitation but was unable to find a therapist willing to supervise the visits given Z.S.'s behaviors and the results of the visits. The case manager consulted the child's therapist, who had stated Z.S. was progressing significantly in individual therapy during the time there was no visitation but that there were no treatments or services remaining and available, including therapeutic visitation, for Keilynn and Z.S. Linde qualified her earlier recommendation of therapeutic visitation

by stating, essentially, that she had suggested it only as a recommendation for a possible solution to the visitation issue and because her agency's policy prohibited her from recommending that visitation cease altogether. The case manager testified about her continued efforts to arrange therapeutic visitation but stated that she could find no one to supervise that visitation. She added, "If we had been able to find someone, we would have put it in place."

¶16 In its termination order, the juvenile court found Z.S. had begun to refuse to attend visitation, and found that "his behavior became out of control and dangerous to himself and those around him before and after the visitation." The court acknowledged it had "ordered that therapeutic visitation take place," and that it had not been "put into place." It subsequently found, however, that DCS had "made diligent efforts through providing assessments and multiple treatment modalities . . . over the course of two dependency cases totaling more than four years" but Keilynn's "processing had not changed," and she had "not remedied the circumstances that cause[d] [Z.S.] to be in an out of home placement." The court added, "Although the Department was not able to provide the Court ordered therapeutic visitation . . . , there is no evidence to support that she has the ability to benefit from therapeutic visitation, and [Z.S.]'s behaviors have improved greatly after having no contact with" Keilynn. Thus, even assuming arguendo that DCS acted less than diligently in regards to therapeutic visitation, the court found this service would have been futile, a finding the record supports.

¶17 Furthermore, there is no support in the record for Keilynn's assertion that therapeutic visitation was "recommended as necessary for reunification." Rather, the record suggests it was recommended as a possible solution to Z.S.'s reactions to visitation after all other efforts to facilitate visitation had been unsuccessful and Keilynn had failed to benefit from the services with which she had been provided. The child's therapist testified, "I don't know that there's any other services that could be put in place during visitation at this time unless there's a therapeutic visit supervisor available, which I don't know if there is." The juvenile court explored this with the therapist at the end of the June 3 hearing,

asking that the issue of therapeutic visitation be explored. The therapist made it clear that if therapeutic visitation could be arranged, it was not a panacea. To the contrary, even if therapeutic visitation might help Z.S. address his behavioral issues, Keilynn was required to change her own behavior, such as refraining from displaying anger, to facilitate a positive change in Z.S.'s reaction to visitation. There was a similar discussion during the hearing on July 8, 2014. Counsel for Z.S. commented that she did not know how the issue of visitation could be resolved, "unless we go to complete therapeutic visitation." The court responded, "I think that therapeutic visitation makes sense, maybe we have the visitation taking place inside with the therapist perhaps or at another location. I don't know how quickly that could be set up but that's more or less what I am thinking." Thus, therapeutic visitation was a service recommended by Z.S.'s therapist to address the difficulties Z.S. had developed with respect to visitation after the motion to terminate Keilynn's rights had already been filed, and after Keilynn had already failed to benefit from extensive services. She has thus overstated the recommendations of the child's therapists and their significance here. Thus, *Jordan C.*, 223 Ariz. 86, ¶ 29, 219 P.3d at 306, and *Mary Ellen C.*, 193 Ariz. 185, ¶ 37, 971 P.2d at 1053, where DCS had failed to "offer the very services that its consulting expert recommends" are distinguishable and Keilynn's reliance on them in this context is misplaced.

¶18 Finally, we reject Keilynn's challenge to the sufficiency of the evidence to support the juvenile court's findings that DCS failed to prove she had been unable to remedy circumstances that caused Z.S. to remain out of home and that there is substantial likelihood she will not be capable of exercising proper and effective parental care and control in the near future. Keilynn essentially asks this court to reweigh the evidence, something we will not do. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). Rather, as we stated previously, we only determine whether reasonable evidence exists in the record to support the court's findings.

¶19 There is abundant evidence in the record to support these and the related findings. We note in particular the case

manager's testimony. Aper summarized the array of the services Keilynn had been provided over the years. She testified that, other than having made some recent progress and having finally succeeded in establishing a bond with Z.S. through parent-child relationship therapy, she had not benefitted from the services provided. Aper did not believe that with additional services Keilynn would be able to parent Z.S. in the near future. The basis for that conclusion, she stated, was the "family assessment and the length of time it's taken for [her] to even make minimal progress in this case."

Disposition

¶20 For the reasons stated, we affirm the juvenile court's order terminating Keilynn's parental rights to Z.S.