IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ASHLEY E.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, B.M., Y.M., R.M., AND R.-M.,
Appellees.

No. 2 CA-JV 2021-0031
Filed September 23, 2021

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NOT FOR PUBLICATION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. JD20180625
The Honorable Ken Sanders, Judge Pro Tempore

AFFIRMED

COUNSEL

Domingo DeGrazia, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Autumn Spritzer, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Appellant Ashley E. challenges the juvenile court's order of April 12, 2021, terminating her parental rights to her children, B.M., Y.M., R.M., and R.-M., on grounds of mental deficiency and the children having been in court-ordered, out-of-home care for more than fifteen months. *See* A.R.S. § 8-533(B)(3), (8)(c).

¶2 On appeal, Ashley argues the juvenile court abused its discretion in ordering termination of her parental rights because the Department of Child Safety (DCS) failed to make diligent efforts toward reunification and to accommodate her cognitive limitations. She also contends the court abused its discretion in finding severance was in R.M.'s best interests because the state did not present "credible evidence of a 'likely' adoptive home." We affirm.

¶3 We view the evidence in the light most favorable to upholding the juvenile court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2 (App. 2008). DCS received a report in 2017 that B.M., then "under the age of three," had been found outside of the home unsupervised, "out in a busy street." DCS found "the home did have safeguards put in place," and it closed the matter as "unsubstantiated . . . after the parents provided all the safeguards for the home and they were provided with community resources." Shortly thereafter, there was a similar incident, and DCS provided in-home services.

¶4 After R.-M. was born prematurely in 2018, DCS received another report of neglect alleging Ashley had only visited R.-M. a few times during her time in the hospital. The other children were also found to have special needs that were not being addressed. DCS initiated an in-home dependency, but after safety monitors violated the safety plan, the children were removed from the home in March 2019.

¶5 Ashley received a psychological evaluation in April 2019, at which she was diagnosed with depression and "borderline intellectual

functioning." The evaluating doctor recommended Ashley participate in "psychoeducational groups in parenting and healthy relationships," individual therapy, couples therapy, and "support in organizing and structuring medical and educational care [for] her children." DCS provided parent-aide services, individual therapy, and "medication monitoring for [Ashley] for depression," and, after finding that "groups really wouldn't be beneficial," it asked Ashley's individual therapist to address healthy relationships as well.

¶6 Ashley attended parent aide "regularly but she did miss a number of sessions, . . . maybe once a month." But in terms of improvement in her parenting skills, "there would be short term improvements and then it would go back to the same way it was." Ashley's case worker testified that her participation in therapy "fluctuated"—she attended "semi regularly" in late summer and early fall of 2019 but "wasn't attending many [sessions] at all" between October and December 2019. Her participation increased again in January 2020, but after completing a series of eighteen sessions, the therapist stopped working with her for a ninety-day break. This was due in part to the short-term therapy model of the provider and in part to Ashley's "reported progress towards her therapy goals." Throughout the process, however, Ashley failed to make consistent improvement in her ability to care for the children.

¶7 Ashley filed an objection to reasonable efforts in July 2020, arguing that DCS should have provided a different modality of counseling due to her traumatic history. But, after a hearing, the juvenile court found DCS had made reasonable efforts and the case plan was changed to severance and adoption. In September, however, Ashley began seeing a second therapist. That therapist testified Ashley had appeared "tired of the process, she felt like she didn't need it and . . . she didn't feel like it was necessary." The therapist ended treatment in December because Ashley "no longer wanted to participate in therapy."

¶8 After a contested severance hearing spanning multiple days from October 2020 to April 2021, the juvenile court ordered Ashley's parental rights severed. It ruled DCS had "diligently offered recommended services," it had proven the time-in-care and mental-deficiency grounds, and severance was in the children's best interests.

¶9 On appeal, Ashley argues the juvenile court abused its discretion by finding DCS had made diligent efforts toward reunification. Indeed, DCS "has an affirmative duty to make all reasonable efforts to preserve the family relationship." *In re Maricopa Cnty. Juv. Action No. JS-*

6520, 157 Ariz. 238, 241 (App. 1988); *see also* § 8-533(B)(8)(c).[1] But in determining whether severance was appropriate in this case, the court was required to consider not only "the availability of reunification services to the parent," but also "the participation of the parent in [those] services." § 8-533(D). Furthermore, DCS "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 (App. 1994). Nor is the court required to "leav[e] the window of opportunity for remediation open indefinitely." *In re Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 577 (App. 1994).

¶10 Ashley argues DCS failed to provide "relevant information to treatment providers at the outset of treatment," specifically information about her "personal history." But, Ashley cites no authority supporting her assertions that DCS was required to gather and disclose information about her history of abuse and make "painstaking effort" to provide such information. *See* Ariz. R. P. Juv. Ct. 106(A); Ariz. R. Civ. App. P. 13(a)(7)(A). And, although we agree for the sake of argument that a parent with cognitive difficulties may require different treatment options than one without, Ashley's argument here amounts to a request that we reweigh the evidence presented to the juvenile court. As detailed above, DCS provided Ashley with ongoing services, and, as she concedes, her treatment providers were uncertain whether additional information from DCS about her background would have made a difference in her treatment. Because we will not reweigh the evidence relating to services on appeal, and the juvenile court's findings are supported by the record, we affirm its ruling as to DCS's reunification efforts. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002).

¶11 Ashley further contends the juvenile court abused its discretion in finding severance was justified on the ground of her mental deficiency because DCS had not adequately shown it "made efforts to accommodate [her] cognitive limitations." In support of her argument, Ashley relies on this court's decision in *Jessica P. v. Dep't of Child Safety*, 249 Ariz. 461, ¶ 25 (App. 2020). But the portion of that decision on which she relies was vacated by our supreme court. *Jessica P. v. Dep't of Child Safety*,

[1]Ashley's argument addresses the statutory requirement that DCS make diligent efforts toward reunification to establish the time-in-care ground for severance. Such efforts are also required, however, to establish that severance is appropriate on mental-health grounds. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 34 (App. 1999).

No. CV-20-0241-PR (Ariz. Dec. 15, 2020) (decision order) (citing *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, ¶ 37 (2018)). On remand, this court acknowledged, as it had in its previous decision, that the Americans with Disabilities Act (ADA) requires DCS to provide compliant services. *Jessica P. v. Dep't of Child Safety*, 251 Ariz. 34, ¶ 14 (App. 2021). It noted, however, that "Arizona's statutory requirement that DCS make reasonable efforts to provide reunification services satisfies the ADA's reasonable accommodation requirement." *Id.* ¶ 15. And, because the mother had not raised an argument based on the ADA in the juvenile court, it reviewed her claim solely for fundamental error. *Id.* ¶ 16.

¶12 In this case, as DCS points out, Ashley has not directed us to anything in the record to establish that she was diagnosed with a disability qualifying her for protection under the ADA. *See* Ariz. R. P. Juv. Ct. 106(A); Ariz. R. Civ. App. P. 13(a)(7)(A). Likewise, she has not cited anything in the record to show that she raised a claim based on the ADA in the juvenile court. *See* Ariz. R. P. Juv. Ct. 106(A); Ariz. R. Civ. App. P. 13(a)(7)(B). On appeal she has not argued, let alone established, that fundamental error occurred, and any such argument is therefore waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to allege fundamental error on appeal waives argument). In any event, for the reasons stated above, we cannot say the court abused its discretion in determining that DCS had made reasonable efforts in view of Ashley's cognitive limitations.

¶13 Finally, Ashley maintains the juvenile court abused its discretion in determining that severance was in R.M.'s best interests "without credible evidence of a 'likely' adoptive home" for him. As our supreme court has directed, when determining best interests, "we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶ 12 (2018) (quoting *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 35 (2005)). "The 'child's interest in stability and security' must be the court's primary concern." *Id.* (quoting *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 15 (2016)). And, "termination is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* ¶ 13. Thus, although a prospective adoption may support a best-interests finding, a court is not "free to disregard other evidence regarding a child's best interests." *Id.*

¶14 In this case, the case manager testified that although R.M.'s current placement was not adoptive, she believed he was adoptable based on his age and his lack of "significant developmental, behavioral, [or]

physical limitations," despite his special needs. Further, severance would allow R.M. "to achieve permanency" and not "linger in foster care" because if the parents' rights were not severed, he "would continue to be in foster care a long time, not know[ing] what's happening with [him] . . . [or] where [he was] going to end up." And, as discussed above, Ashley's continued failure to improve her ability to parent R.M. left him in that uncertain situation unless her rights were severed. Ashley's argument that the juvenile court abused its discretion in concluding severance was in R.M.'s best interests focuses solely on R.M.'s lack of an adoptive placement and again asks this court to reweigh the other evidence of best interests, which we will not do. *See Jesus M.*, 203 Ariz. 278, ¶ 12.

¶15 For these reasons, we affirm the juvenile court's order terminating Ashley's parental rights.