

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

NICOLE C.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND T.N.,
Appellees.

No. 2 CA-JV 2021-0076
Filed December 14, 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NOT FOR PUBLICATION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. JD20170419
The Honorable Laurie B. San Angelo, Judge

AFFIRMED

COUNSEL

Sarah Michèle Martin, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By James W. Rappaport, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez concurred .

BREARCLIFFE, Judge:

¶1 Nicole C., appeals from the juvenile court's June 2021 order terminating her parental rights to T.N., born in August 2016, on the ground of length of time in court-ordered care under A.R.S. § 8-533(B)(8)(c). She challenges the sufficiency of the evidence to support the court's findings under this section of the statute and the finding that termination of her rights is in the child's best interests. We affirm for the reasons stated below.

¶2 Before the juvenile court may terminate a parent's rights, it must find by clear and convincing evidence that at least one statutory ground for severance exists and that a preponderance of the evidence establishes terminating the parent's rights is in the best interests of the child. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). As appellee Department of Child Safety (DCS) correctly points out, although Nicole argues she is raising questions of law regarding the interpretation and application of constitutional and statutory provisions and our review of the order is *de novo*, she is actually challenging the sufficiency of the evidence to support the ruling. Consequently, we review the order for an abuse of discretion and will not disturb the ruling if the record contains reasonable evidence to support the factual findings upon which it is based. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 8 (App. 2004). We view the evidence and all inferences arising from that evidence in the light most favorable to upholding the ruling. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12 (App. 2007). So viewed, the evidence and the record establish the following.

¶3 DCS received a report in July 2017 that Nicole was using heroin and neglecting T.N., who was just under a year old. She was purportedly leaving him with anyone who would take him, including other heroin users, and had been evicted from the apartment where she had been living. According to the DCS investigator, the home where Nicole was staying was unsafe for T.N. She testified at the severance hearing that she saw what appeared to be open alcohol containers, drugs, burnt pieces of tinfoil, a glass and metal pipe, debris and other dangerous objects, and

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rotten food. Nicole was incoherent and acting erratically. According to the investigator, T.N. was falling over on the couch, crying and coughing, and Nicole did not console him. Although the investigator tried to remove T.N., before law enforcement officers arrived to assist her, Nicole fled quickly in a car with a friend, taking the child, who was not restrained in a car seat.

¶4 It was also reported that Nicole had a history of domestic violence, had been involved with Child Protective Services (CPS) in New Jersey and Pennsylvania, and had untreated mental illness, including bipolar disorder and post-traumatic stress disorder (PTSD). Nicole's parental rights to three other children had been terminated. A DCS investigator spoke to a New Jersey caseworker who stated Nicole had been missing since May of 2016. A Pennsylvania CPS caseworker informed the investigator that T.N. had been born drug-exposed and had tested positive for opiates.

¶5 Law enforcement officers located Nicole and T.N. two days later. The DCS investigator testified at the severance hearing that the child "was pretty unsightly" when he was found. "He was sitting in the same clothes. It appeared that his diaper had not been changed for a pretty significant period of time," because it was "starting to come apart and he was covered in feces." She described Nicole's behavior as aggressive, stating she was "yelling and screaming" and would not speak to the investigator. DCS took custody of T.N. and filed a dependency petition. DCS alleged the child's father, Tazmer N., was incarcerated in New Jersey and Nicole was homeless. DCS described the child's deplorable condition the day he was removed from Nicole's custody, and further alleged in the petition that Nicole's ability to care for T.N. was "impaired by substance abuse and/or unstable mental health."

¶6 The juvenile court adjudicated T.N. dependent as to Tazmer in October 2017 after he pled no contest to the allegations in the dependency petition. In November 2017, after Nicole failed to appear at the continued facilitated settlement conference on November 30, 2017, the juvenile court deemed the allegations of the petition admitted and adjudicated T.N. dependent as to her. Nicole had apparently moved to New Jersey, then to New York, and then back to New Jersey, where DCS provided her with various services through a New Jersey agency, including referrals for a psychiatric evaluation, intensive out-patient treatment, and a psychological evaluation. Although she participated in some of services, she refused to cooperate with the psychologist and did not complete the evaluation. Nicole returned to Arizona in 2018. DCS continued to provide her with reunification services.

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¶7 After participating in a psychological evaluation in August 2018, Nicole was diagnosed with PTSD, antisocial personality disorder, and depressive disorder. The psychologist recommended that she participate in individual counseling to address issues with past trauma, abuse, impulse control, and anger management. Nicole availed herself of some of these services, but DCS reported that she was confrontational and argumentative with staff when visiting with T.N. In August 2019, following a dependency review hearing, the juvenile court observed that T.N., whose dependent status persisted, had been in court-ordered care for longer than fifteen months, and he was not in a relative placement. Therefore, the court stated that, based on applicable federal law, it was changing the case plan from reunification to severance and adoption. DCS filed a motion to terminate Nicole's parental rights based on the length of time in court-ordered care. It also sought to terminate Tazmer's parental rights based on the length of his prison term.

¶8 After severance hearings that were held between January 2020 and March 2021, the juvenile court granted the motion, terminating both parents' rights to T.N.¹ In its twenty-page ruling, the court reviewed the history of the case, and made detailed factual findings regarding the services DCS provided, those services she had completed and those she had not, and Nicole's conduct during the course of the dependency proceeding. The court identified the elements of § 8-533(B)(8), and made additional factual findings related to these elements. The court found Nicole had been unable "to remedy the circumstances that have caused out-of-home placement." The court also found that "[a]lthough the mother participated in many services and completed them, she has not shown the necessary benefits or behavioral changes." The court acknowledged that some of the service providers had positive reports regarding Nicole's participation in those services but found her behavior was, at times, "erratic and aggressive," and she had threatened "to harm the caseworker on more than one occasion." The court found she had been "erratic and abusive" to service providers, and did not demonstrate an awareness of how her emotions and actions affected T.N.

¶9 The juvenile court acknowledged Nicole had progressed in certain respects and appeared to be sober and "able to address her own emotional needs as she worked on improving her life." But, the court found, she continued to struggle with managing her anger, irrational behavior and impulsivity. The court found Nicole was unable to make T.N.

¹Tazmer is not a party to this appeal.

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a priority and remained resistant and defensive when it came to services that addressed parenting, stating she “has not demonstrated that she can put aside her disagreements with services providers to ensure that the child receives the services he needs.” Following the language of the statute, the court concluded there was not a substantial likelihood that Nicole would be capable of exercising proper and effective parental care and control in the future, noting she had years to remedy the circumstances that resulted in T.N.’s placement out of the home, but she had failed. And, the court found, based on her psychological evaluations, her prognosis for being able to parent her child in the foreseeable future was poor. Articulating the correct standard for the best-interests portion of its inquiry, the court entered factual findings related to that standard and concluded DCS had established by a preponderance of the evidence termination of both parents’ rights was in T.N.’s best interests.

¶10 Nicole first contends that there was not a “scintilla of evidence” to support the juvenile court’s termination of her rights based on the length of time T.N. was in court-ordered care. She asserts the evidence contradicts the court’s factual findings, insisting she “consistently and successfully participated in her case plan services.” Nicole relies on evidence from service providers in New Jersey describing her as “pleasant and cooperative,” “a model client” who had made “great strides” in addressing her substance abuse and anger management issues. Pointing to evidence that was favorable to her, she claims that evidence refutes the court’s findings, specifically its finding that at times she was combative and aggressive.

¶11 Nicole relies, in part, on the DCS case specialist’s testimony that Nicole’s home with her fiancé was safe and appropriate, and the case specialist’s statement that she was not concerned about Nicole’s substance abuse issues. She also relies on the testimony of the instructor for a parenting program for toddlers through the Easter Seals Blake Foundation that Nicole was cooperative, polite and engaged. Additionally, she points to the testimony of and report by Shannon Evans, MSW, also of the Easter Seals Blake Foundation, that by September 2019, Nicole had “accomplished all of her goals,” “knew how to parent effectively,” and testimony of Nicole’s therapists. One of the therapists saw her for six months and stated that although Nicole was upset that T.N. had been removed from her care, she was “grateful” for the help DCS had provided her so that she could make changes in her life. The other therapist Nicole points to stated that she was cooperative, punctual and well-groomed and worked hard at her treatment goals and had benefitted from it and was stable.

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¶12 It is for the juvenile court, not this court, to weigh the evidence before it and judge the credibility of witnesses. *See Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18 (App. 2009). To the extent there are conflicts in the evidence, it is for the juvenile court to resolve them. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002) (resolution of conflicts in evidence “is uniquely the province of the juvenile court as the trier of fact”). We do not reweigh the evidence on appeal. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 14 (App. 2004). Rather, as we previously stated, we must view the evidence in the light most favorable to sustaining the court’s ruling, and determine whether there is reasonable evidence in the record to support the findings upon which the order is based. *See Jordan C.*, 223 Ariz. 86, ¶ 18. Here, we must determine whether there is reasonable evidence to support the court’s findings under § 8-533(B)(8)(c) that at the time the court entered the order, T.N. had been out of the home in court-ordered care for fifteen months or longer and Nicole had been “unable to remedy the circumstances that cause[d] the child” to remain out of the home and “there is a substantial likelihood that the parent will not be capable of exercising proper and effective care and control in the near future.”

¶13 It is undisputed that, as the juvenile court found in its June 2021 under-advisement order, T.N. had been in foster care since July 2017, more than forty-six months. The court made extensive factual findings related to the remaining elements of the statute, which are supported by reasonable evidence, some of which we summarized and quoted above. For example, the court found that although Nicole had participated in and completed many services, “she has not shown the necessary benefits or behavioral changes.” And, the court acknowledged evidence that was favorable to Nicole, including positive reports from some service providers. But, the court commented, some of these providers had “observed or worked with the mother in a limited association on the case.” The court added that Nicole’s behaviors with DCS had been “erratic and aggressive, threatening to harm the caseworker on more than one occasion,” referring to a specific exhibit that supported this finding. The court explained that, notwithstanding some positive reports, Nicole had failed to demonstrate the changes necessary to be able to parent T.N. safely and effectively. The court found she continued to struggle with anger issues, at times acted irrationally and impulsively, and was unable to prioritize T.N.’s needs so that he could safely visit her without supervision.

¶14 There is reasonable evidence in the record supporting these and other findings that the juvenile court made. In addition to the evidence summarized above, the case manager testified, for example, that although

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Nicole participated in and benefitted from the services provided, she still was unable to parent T.N. Illustrating this, the case manager stated that with respect to the ongoing issue of the child's special dietary needs, Nicole was becoming defensive and "almost argumentative" when suggestions were made that she change what she was feeding him. She observed Nicole become argumentative on "numerous occasions," and hostile. Explaining her conclusion that Nicole was not able to parent T.N. at that time, she expressed concern that once Nicole is no longer receiving all of the services provided, she would be unable to parent T.N. on her own. She questioned Nicole's problem-solving skills, noting that Nicole can "quickly become irrational or quickly jump to conclusions without knowing the full content of something." We will not second-guess the juvenile court.²

¶15 Nicole also challenges the juvenile court's finding that termination of her rights was in T.N.'s best interests. Articulating the proper standard for determining whether termination of a parent's rights is in a child's best interests, the court found DCS sustained its burden of proving this element by a preponderance of the evidence. As the court found, T.N. remained in the same foster home where he had been placed in November 2017. The court further found, and the record establishes, that the foster parents wish to adopt T.N., adding that he is "described as bright and clever," and is "adoptable . . . despite his challenging behaviors at time[s]." The court added that T.N. "has participated in therapy to address his anxiety related to his circumstances of not knowing in whose home he will grow up." The benefit to termination of the parents' rights, the court found, is it will provide the child with permanency.

¶16 Again, Nicole supports her argument by citing favorable evidence regarding her success with some of the services and the bond she has with him as his biological parent, quoting the case specialist's testimony that "it is important for children to be raised by their parents as long as they

²Nicole summarily suggests that DCS provided inadequate services. But she has not meaningfully or sufficiently raised this as an issue on appeal, nor has she previously challenged the reasonableness of the services. The claim is waived and we address it no further. *See* Ariz. R. Civ. App. P. 13(a)(7) (opening brief must contain argument with supporting reasons and citations to legal authorities and references in record); Ariz. R. P. Juv. Ct. 106(A) ("ARCAP 13 and 14" apply to juvenile proceedings); *Shawnee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶¶ 13-18 (App. 2014) (failure to object to adequacy of services during case plan waives challenge for appeal).

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are safe and appropriate.” Once more, we will not reweigh the evidence. There is reasonable evidence in the record that supports the juvenile court’s findings.

¶17 For the reasons stated, we affirm the juvenile court’s order terminating Nicole’s parental rights to T.N.