IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

FREDERICK C. AND KATHRYN C.,
Appellants,

v.

DEPARTMENT OF CHILD SAFETY, JESSE H., C.C., AND A.C.,
Appellees.

No. 2 CA-JV 2021-0157 and No. 2 CA-JV 2022-0002 (Consolidated)
Filed May 25, 2022

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NOT FOR PUBLICATION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. JD20180208
The Honorable Casey F. McGinley, Judge

AFFIRMED

COUNSEL

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and

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MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 Frederick C. and Kathryn C. appeal from the juvenile court's order establishing a permanent guardianship for their children, C.C. (born in January 2007) and A.C. (born in April 2012). They maintain the Department of Child Safety (DCS) failed to provide reunification services and the court misapplied the guardianship statute, A.R.S. § 8-871(A). For the following reasons, we affirm.

Factual and Procedural Background

¶2 Frederick and Kathryn are the biological parents of C.C., A.C., Z.C. (born in August 2014), and J.C. (born in November 2015).[1] In July 2016, the family was evicted from their Texas home and was living in a hotel. Jesse H., the children's maternal uncle, agreed that the two oldest children, C.C. and A.C., could temporarily stay with him in Tucson, while Frederick and Kathryn "[got] on [their] feet." The parties later agreed C.C. and A.C. would remain in Tucson through the 2016-2017 school year. In the summer of 2017, however, Kathryn was still looking for employment, and the children remained with Jesse, who resides with the maternal grandmother.

[1]J.C. and Z.C. remained in the custody of their parents in Texas during the pendency of these proceedings.

Although the parents did not visit C.C. and A.C., they regularly communicated by telephone and text. The parents occasionally sent money and gifts, but, in April 2018, A.C. needed extensive dental work, which Jesse largely paid for.

¶3 That same month, Jesse filed a dependency petition, alleging C.C. and A.C. were dependent as to Frederick and Kathryn because of their "unstable lifestyle." He further asserted the parents had engaged in domestic violence and drug use in front of the children, the children had suffered physical abuse by the parents, and Frederick suffered from mental-health issues. Shortly thereafter, Jesse also filed a petition for termination of the parent-child relationship based on mental illness or chronic substance abuse. At a hearing in May 2018, the juvenile court ordered that the parents have telephone contact with the children three times per week supervised by a neutral third party.

¶4 At the combined contested dependency and severance trial in September 2018, the parties informed the juvenile court they had reached an agreement for Jesse to serve as permanent guardian of C.C. and A.C. and for the parents to enter a no contest plea to the dependency petition. However, at the next hearing, Frederick and Kathryn moved to set aside their agreement. The court later granted that motion, explaining that the parents had withdrawn their consent before it had entered any findings or orders. The court therefore reset the matter for trial in February 2019.

¶5 After the trial, but before the juvenile court had issued its ruling, Kathryn filed a motion to enforce the May 2018 visitation order, alleging that telephone contact between the parents and children had stopped after the September 2018 hearing. Jesse responded that, while he had stopped paying for a professional agency to facilitate contact, he continued to offer C.C. and A.C. the opportunity to call their parents, but they repeatedly declined to do so. C.C. and A.C. concurred with Jesse's response and reiterated that they "do not desire any contact with their parents at this time." The court set the matter for a hearing in May 2019.

¶6 Meanwhile, in April 2019, the juvenile court issued its under-advisement ruling on the contested dependency and termination. Although the court found that Jesse had not established the statutory grounds for termination, it adjudicated C.C. and A.C. dependent as to Frederick and Kathryn and ordered DCS to substitute as petitioner. This court affirmed the order denying termination on appeal. *C.C., A.C., & Jesse*

H. v. Kathryn C. & Frederick C., Nos. 2 CA-JV 2019-0049, 2 CA-JV 2019-0052 (Ariz. App. Sept. 17, 2019) (consol. mem. decision).

¶7 At the May 2019 hearing on visitation, the parents also requested that the children be seen by different therapists. The children objected to that request. The juvenile court determined that visitation had stopped based on a "good faith mistake," not any "untoward acts" by Jesse, and ordered visitation to resume only after there was a therapeutic recommendation for it. The court also declined to change the children's therapists.

¶8 At a hearing in September 2019, the juvenile court set a case plan goal of family reunification and ordered the parents to drug test. Although the parties disputed whether DCS had made reasonable efforts to provide reunification services, the court declined to make any such finding at that time and directed DCS to assist the parents "in whatever way to at least locate and find service providers," given that they were in Texas. In December 2019, Kathryn and the children separately filed objections to a finding that DCS had made reasonable efforts. At review hearings in early 2020, the court again declined to make a reasonable-efforts finding, noting that it needed "to hear testimony clearly to create a good record and to be able to judge the credibility of the witnesses."

¶9 Because of company policy, the children's therapists would not provide recommendations on visitation or reunification. DCS referred the case for a clinical family assessment to evaluate the relationship and bond between the parents and children. After some initial delay,[2] Dr. Dee Winsky, a licensed psychologist, received the referral. However, the amount authorized for her compensation was insufficient for a family assessment. Winsky therefore suggested a less extensive best-interests evaluation, stating she would only seek additional compensation if she determined it was necessary to meet with the parents.

¶10 Dr. Winsky interviewed C.C. and A.C. in March 2020. When she asked the children about their parents, each became "serious" and

[2] The children requested a specific individual complete the assessment, but the DCS supervisor was unsuccessful, despite several meetings, in getting approval for that person, apparently, at least in part, because of the amount requested to complete the work. The caseworker also later learned that DCS had stopped offering clinical family assessments in mid-2018.

"stressed" and reported that their parents had physically and verbally abused them. Winsky concluded that the children "are obviously still very fearful of their parents and fearful of having any contact with them" and "[i]t would be reckless to require [them to] have contact with their parents." She completed the best-interests evaluation without interviewing the parents, explaining that "interviewing other family members . . . would not have changed those conclusions."

¶11 At an April 2020 hearing, the juvenile court determined that DCS had "made reasonable efforts as to this reporting period" but again reserved its finding of reasonable efforts as to the prior period. The services at that time included: a referral for a best-interests evaluation, a referral to a counseling center, a referral to a drug-testing site, a child safety assessment, a behavioral change assessment, and an in-home safety analysis. The court made "no changes" to its visitation order but encouraged the parties to seek reconsideration of that order when appropriate.

¶12 In June 2020, after taking additional testimony and evidence, the juvenile court took the issue of the earlier finding of reasonable efforts under advisement. The court issued its written ruling later that month. The court noted its concerns with DCS's efforts, explaining that DCS was "perilously close to a finding that they had not provided reasonable efforts for the time period at issue." But, the court continued, DCS "refocused its efforts" and provided the following services: "case planning, case management services, attempts to facilitate drug testing, standard records requests and subpoenas to [Veterans Affairs (VA)] regarding counseling services and individual therapy, and attempts to provide trauma informed parenting education and non-offending parenting classes." The court found that, although "many of these efforts were unsuccessful, they were reasonable." It therefore denied the motions for a finding of no reasonable efforts.

¶13 At a review hearing in August 2020, the juvenile court again determined that DCS had made reasonable efforts to provide reunification services. The court identified the following services: a comprehensive medical and dental plan, supervised telephone contact with the paternal grandfather, monthly home visits, drug testing, therapeutic services, individual therapy, working with the VA to determine appropriate services, parenting classes, couple's counseling, and assessments for visitation.

¶14 That same month, Kathryn filed a motion—which Frederick joined—for a clinical family assessment or, alternatively, a reunification assessment to be completed by Sherri Mikels-Romero, a licensed clinical social worker.[3] The juvenile court heard testimony on the motion over several days from October 2020 through February 2021. The court issued its under-advisement ruling in April 2021, denying the motion. The court explained that Dr. Winsky's assessment "provided the Court with the specific recommendation sought"—"an understanding of the children's fear of their parents and why contact is not yet appropriate between the parents and children."

¶15 At a review hearing in June 2021, the juvenile court found that DCS had again made "reasonable efforts to effectuate reunification by offering a variety of services," including the recent psychological evaluations of the parents. It also changed the case plan to permanent guardianship. DCS subsequently filed a motion for appointment of Jesse as permanent guardian of C.C. and A.C. Thereafter, C.C. filed a motion for an in-chambers interview "to permit the minor to speak with the judge" before the contested guardianship trial. The court granted that request, and, during the interview, C.C. expressed his desire to remain in Tucson with Jesse: "If you let me stay in Arizona, I'd be the happiest kid in the entire universe." C.C. explained, in part, that Frederick was "very abusive" toward him and Kathryn "would rarely do anything about it"; that he was doing better in school, was eating healthier, and was well cared for with Jesse; and that Jesse gave him positive feedback and encouragement.

¶16 The juvenile court held a contested guardianship trial in October 2021. It subsequently issued its under-advisement ruling, granting the motion for appointment of permanent guardian and naming Jesse as permanent guardian of C. C. and A.C. The court incorporated into the ruling its June 2020 ruling on reasonable efforts and April 2021 ruling on a clinical family assessment. This appeal followed.[4]

[3]Mikels-Romero testified that she no longer contracted with DCS and was unsure whether she could work with the family.

[4]Although Frederick and Kathryn filed separate notices, this court consolidated the appeals.

Discussion

¶17 Frederick and Kathryn argue that DCS failed to provide reunification services and that the juvenile court misapplied § 8-871(A). We review questions of law de novo, *In re Guardianship of Sleeth*, 226 Ariz. 171, ¶ 12 (App. 2010), but we will not reverse an order for permanent guardianship unless it is clearly erroneous, *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555 (App. 1997). When reviewing a guardianship order, we accept the juvenile court's findings of fact unless reasonable evidence does not support them. *Navajo Nation v. Dep't of Child Safety*, 246 Ariz. 463, ¶ 9 (App. 2019).

¶18 The right to custody of one's child is fundamental but not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶¶ 11-12 (2000). Under § 8-871(A), the juvenile court may establish a permanent guardianship if the guardianship is in the child's best interests and the following criteria are met:

> 1. The child has been adjudicated a dependent child . . . .
>
> 2. The child has been in the custody of the prospective permanent guardian for at least nine months . . . .
>
> 3. [DCS] has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds one or more of the following:
>
>   (a) Reunification efforts are not required by law.
>
>   (b) Reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child.
>
>   (c) The child is the subject of a pending dependency petition and there has been no adjudication of dependency.

> 4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests.

The party that files the motion for guardianship—DCS in this case—bears the burden of proof by clear and convincing evidence. A.R.S. § 8-872(G). "In proceedings for permanent guardianship, the court shall give primary consideration to the physical, mental and emotional needs and safety of the child." § 8-871(C); *see also* Ariz. R. P. Juv. Ct. 63(D)(3).

¶19 Of the four requirements in § 8-871(A), only the third is at issue here. Frederick and Kathryn first argue that DCS failed to provide reunification services; specifically, they contend DCS should have offered visitation and a clinical family assessment.[5]

¶20 Although 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), it is required to provide the parent with "the time and opportunity to participate in programs designed to improve the parent's ability to care for the child," *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 37 (App. 1999). DCS must "undertake measures with a reasonable prospect of success," *Donald W. v. Dep't of Child Safety*, 247 Ariz. 9, ¶ 46 (App. 2019) (quoting *Mary Ellen C.*, 193 Ariz. 185, ¶ 34), but need not undertake futile measures, *Mary Ellen C.*, 193 Ariz. 185, ¶ 1.

¶21 DCS became involved in this case in April 2019. Whether DCS made reasonable efforts to provide reunification services was a continuing issue below. Early on, the juvenile court recognized that DCS was "perilously close" to a finding of no reasonable efforts. But, as the court also recognized, DCS "refocused its efforts" and thereafter provided the

[5]Frederick and Kathryn did not seek review of either the juvenile court's May 2019 order halting visitation—or subsequent affirmations of that order—or April 2021 denial of the request for a clinical family assessment. Challenging the orders before the court established a permanent guardianship would have saved time and preserved judicial resources. *See Ariz. Dep't of Econ. Sec. v. Superior Court*, 186 Ariz. 405, 407 (App. 1996) (speedy determination is of "greater importance" in juvenile guardianship action). We nonetheless address the arguments here.

family a variety of services. As mentioned above, those services included: team meetings, a best-interests assessment, drug testing, psychological evaluations, therapy, counseling, parenting classes, an in-home safety analysis, a comprehensive medical and dental plan, and visitation with the paternal grandfather. The court's finding of reasonable efforts is supported by the record. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, ¶¶ 14-15 (App. 2011) (reviewing record for reasonable evidence supporting trial court's finding concerning services).

¶22 Frederick and Kathryn nevertheless contend that visitation was "the one service that was desperately needed for reunification" but the juvenile court denied their request "for several years . . . without any legal justification." The court explained, however, that it would not order visitation until there was a therapeutic recommendation for it. That determination was based largely on the children's own wishes, and the court encouraged the parties to seek reconsideration of that order "at any time." We cannot say that the court abused its discretion. *See In re Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 375 (App. 1994) ("Although a parent should be denied the right of visitation only under extraordinary circumstances, once that right is at issue, the trial court has broad discretion." (citations omitted)).

¶23 The parents' reliance on *Desiree S. v. Department of Child Safety*, 235 Ariz. 532 (App. 2014), is misplaced. There, a son was removed from his mother's care based on her husband's abuse of the son. *Id.* ¶¶ 2-4. The mother successfully completed all the services offered by DCS except for family counseling, which the son refused to attend with her. *Id.* ¶ 9. The son did not want to return to the mother, "fearing she would not be able to protect him from abuse." *Id.* ¶ 10. On appeal, this court determined that the mother's rights to her son could not be terminated because the son's "subjective belief, without more, cannot be the sole basis" to determine that she "will be unable to parent him in the near future." *Id.* ¶¶ 1, 11.

¶24 Here, in contrast, we are dealing with a permanent guardianship, which does not require a finding that that the parents will be unable to parent the children in the near future. *Compare* § 8-871(A), *with* A.R.S. § 8-533(B)(8). Moreover, the juvenile court's order of a permanent guardianship was not based solely on the children's wishes of no contact with their parents. It was also based on the clinical recommendation of Dr. Winsky and the parents' failure "to understand how their actions caused [C.C.] and [A.C.] to not want to return to their care."

¶25 Frederick and Kathryn further assert that "[t]he juvenile court had a constitutional obligation to order a clinical family assessment." But they cite no authority for their assertion, instead suggesting the court was "blind to the fact" that the "case plan could never successfully reunify C.C. and A.C. with their parents," absent a family assessment that supported visitation.

¶26 After a hearing spanning several days on the motion for a clinical family assessment, the juvenile court thoroughly explained in a written under-advisement ruling why it was denying the request. The court observed that Dr. Winsky's assessment provided "the specific recommendation sought" and that it did not "see the benefit to either child in requiring them to further discuss their allegations with yet another individual." The court also questioned the methodology, explaining that "the proposed assessment in effect requires the children to have contact with their parents in order to determine whether such contact is . . . appropriate and in their best interests" but "the first determination should be whether such contact is appropriate." The children's therapists similarly indicated that it was important not to push C.C. and A.C. toward contact; instead, they recommended waiting until the children were "open to having a conversation about contact with their parents."

¶27 The juvenile court recognized the precise issue that Frederick and Kathryn bemoan: "[T]he minors' decision not to want to have contact with their parents is very much a factor in what the parents are capable of doing in achieving reunification." But the court correctly recognized that it "must give primary consideration to the physical, mental, and emotional needs of [A.C.] and [C.C.]." *See* § 8-871(C); *see also* Ariz. R. P. Juv. Ct. 63(D)(3). Despite years of therapy, the children's opinions did not change during the course of the proceedings—they remained fearful of their parents and adamant that they did not want contact.

¶28 Frederick and Kathryn next contend the juvenile court "committed legal error" because it "failed to find any of the three reasons provided in § 8-871(A)(3) for terminating reunification services." But this argument was not raised below, and we could therefore deem it waived on appeal. *See Logan B. v. Dep't of Child Safety*, 244 Ariz. 532, ¶ 9 (App. 2018); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal."). In any event, the parents misconstrue the statute.

¶29 Section 8-871(A)(3) provides that, when establishing a permanent guardianship, the juvenile court must find that DCS "made reasonable efforts to reunite the parent and child and further efforts would be unproductive." *See In re Adam P.*, 201 Ariz. 289, ¶¶ 12-13 (App. 2001) (if statute's language is plain and unambiguous, we must apply it as written). The statute then lists three exceptions that are only relevant if the court intends to waive the requirement for reasonable efforts.

¶30 Here, the juvenile court determined that DCS had "made reasonable efforts to reunite the parents with their children" by providing a variety of services, as detailed above. The court also found that "[f]urther efforts at reunification services would be unproductive." The court therefore did not need to reach the three exceptions listed in § 8-871(A)(3).

¶31 Frederick and Kathryn nevertheless maintain, "even if the juvenile court's analysis was faithful to the statute, the Arizona Supreme Court has now called into question the constitutionality of this statute." They rely on *Jessie D. v. Department of Child Safety*, 251 Ariz. 574, ¶¶ 18-20 (2021), where the court determined, "DCS must make diligent efforts to preserve the family by providing services to assist parents in maintaining a bond with their children," despite the absence of an explicit requirement to provide reunification services in A.R.S. § 8-533(B)(4). But the parents also failed to raise this issue below, and again we could deem it waived. *See Logan B.*, 244 Ariz. 532, ¶ 9; *see also Trantor*, 179 Ariz. at 300. Even assuming it were not waived, however, *Jessie D.* is distinguishable.

¶32 *Jessie D.* involved a termination of parental rights based on a father's felony conviction and resulting prison sentence under § 8-533(B)(4). 251 Ariz. 574, ¶¶ 1, 5. Here, in contrast, we are concerned with a permanent guardianship under § 8-871(A). Unlike § 8-533(B)(4), § 8-871(A)(3) generally requires DCS to provide reasonable efforts to reunite the parent and child. In addition, the reasoning of *Jessie D.* does not apply here, where neither of the parents is incarcerated. The juvenile court therefore did not err in applying § 8-871(A)(3). *See Guardianship of Sleeth*, 226 Ariz. 171, ¶ 12.

¶33 Finally, Frederick and Kathryn argue that the juvenile court's ruling amounts to a "de facto severance." But a "court order vesting permanent guardianship with an individual divests the birth . . . parent of legal custody of or guardianship for the child"; it "does not terminate the parent's rights." § 8-872(H). Unlike with terminations, the "court can tailor the guardianship to the child's unique best interests." *Timothy B. v. Dep't of Child Safety*, 252 Ariz. 470, ¶ 25 (2022). And the guardianship can be

revoked upon a change in circumstances. A.R.S. § 8-873(A). Indeed, at the contested guardianship trial, the caseworker expressed hope that the children would want to resume contact with their parents as they grew older if contact was not "forced upon them."

Disposition

¶34 For the foregoing reasons, we affirm the juvenile court's order establishing a permanent guardianship for C.C. and A.C.