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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SARAH C., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, MICHAEL C., ISAAC C., and ADAM C., Appellees.	2 CA-JV 2009-0039 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-179183

Honorable Leslie Miller, Judge

AFFIRMED

Sara Michèle Martin — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
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V Á S Q U E Z, Judge.

¶1 Sarah C. appeals from the juvenile court's order terminating her parental rights to her three children—Michael, born May 1998; Isaac, born December 2000; and Adam, born July 2002—on grounds of neglect and length of time in care.[1] *See* A.R.S. § 8-533(B)(2) (neglect) and (B)(8)(c) (fifteen months or more in court-ordered, out-of-home placement). On appeal, she contends the court erred in excluding testimony at the termination hearing about the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132. She also challenges the sufficiency of the evidence to establish that the Arizona Department of Economic Security (ADES) had made reasonable efforts to preserve the family and the court's finding that severance was in the children's best interests. For the reasons that follow, we affirm.

Facts and Procedure

¶2 We view the evidence presented at the severance hearing in the light most favorable to upholding the juvenile court's order. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Between 2002 and 2006, Child Protective Services (CPS) received approximately eight reports that Sarah, who is legally blind, and her husband Joseph were neglecting or physically abusing their children. During this time, CPS provided the parents with in-home services.

¶3 On August 7, 2006, CPS received a report that the family home was dirty and that Joseph was mentally ill. Upon visiting the home, a CPS investigator and a police officer observed that the children's bedroom was "unlivable" due to cat feces, cat litter, and clothing

[1]The juvenile court simultaneously severed the parental rights of the children's father, Joseph. He has filed a separate appeal from the termination order.

strewn about the room. The kitchen sink was overflowing with dirty dishes; frozen hamburger was thawing on the stove, surrounded by dirty pots and pans; and the refrigerator contained little food. "Based on the condition of the home, the frequent CPS reports, and the parents' refusal to cooperate with voluntary services," CPS removed the children and filed a dependency petition. The children were returned to the home on August 18.

¶4 Sarah subsequently admitted the allegations of an amended dependency petition, and the juvenile court adjudicated the children dependent as to her on October 5, 2006. The children remained at home until CPS removed them again on September 27, 2007, after receiving a report that Sarah had hit Michael and the children were afraid to go home after school. Although the initial case plan goal was family reunification, that goal was changed to severance and adoption after a permanency hearing in December 2008. ADES filed a motion to terminate Sarah's parental rights, alleging the statutory grounds of abuse or neglect pursuant to § 8-533(B)(2) and length of time in care pursuant to § 8-533(B)(8)(c). After a five-day hearing, the court found ADES had proven both grounds alleged and terminated Sarah's rights to all three children. She has timely appealed the court's order.

Discussion

Americans with Disabilities Act

¶5 Sarah first argues the juvenile court erred in precluding evidence regarding the ADA, including her witnesses from the National Federation for the Blind who would have testified about the special needs of blind persons. She contends the evidence would have

supported her argument that ADES had not made a sufficient effort to preserve the family, as it was required to do.[2] *See* § 8-533(B)(8).

¶6 Before the termination hearing, the state moved to preclude this evidence, arguing it was irrelevant. At the hearing on the motion, the juvenile court stated:

> I don't see that the Arizona Courts say anything other than you have to make reasonable efforts and you have to consider the needs of the particular individual before you can determine whether reasonable efforts have been made[,] but it is no different analysis than it is for anybody else who has whatever . . . disability . . . [. T]hose are issues that the Department must cooperate with and must provide services to allow the parent to attempt to reunify but it's not a[n] ADA issue.

On appeal, Sarah argues the evidence was relevant and admissible because the juvenile court, as the trier of fact, "need[ed] adequate information about [her] specific needs . . . before being able to determine what kinds of reasonable accommodations were necessary and available to insure that the State was indeed making reasonable efforts at family reunification." She also contends that, "even if the ADA itself is not applicable directly to the proceedings, . . . the standards under the act must inform the court as to [her] rights and needs."

¶7 Preliminarily, as Sarah's reply brief makes clear, she is not claiming that a violation of the ADA "is a defense to a termination of parental rights. Rather, [she] submits that an understanding of the specific needs of the blind was essential to the court's

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[2]The state does not argue on appeal that a finding of reasonable efforts was not required for termination under § 8-533(B)(2). We therefore assume, without deciding, that such a finding would be necessary to support termination on that ground.

determination of reasonable efforts." The ADA requires that individuals with disabilities be provided with "reasonable modifications to rules, policies or practices . . . or . . . auxiliary aids and services" to enable their "participation in programs or activities provided by a public entity." *See* 42 U.S.C. § 12131(2). However, this court has already recognized that "'reasonable efforts' include[] seeking to reasonably accommodate disabilities from which a parent may suffer. We view reasonable accommodations as a component of making 'reasonable efforts.'" *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, ¶ 20, 159 P.3d 562, 566 (App. 2007). Therefore, we need not decide whether the ADA itself applies to termination proceedings.

¶8 The gravamen of Sarah's argument is that she was entitled to present evidence concerning the needs of blind persons to inform the juvenile court's determination of the reasonableness of the reunification services provided by ADES. We review a juvenile court's admission or exclusion of evidence for an abuse of discretion and will not reverse absent resulting prejudice. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 11, 178 P.3d 511, 514 (App. 2008).

¶9 To be admissible, evidence must be relevant, that is, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Sarah is correct that ADES was required to make a diligent effort to provide appropriate services to reunify the family. *See* § 8-533(B)(8). Thus, Sarah's argument that the ADA

evidence was relevant appears facially to have merit, but it does not hold up under closer scrutiny.

¶10 In her pretrial statement, Sarah stated that the witnesses from the National Federation for the Blind would "testify how the blind are prejudiced against and [about] the prejudice toward [Sarah] at [the] Child and Family Team [(CFT)] Meetings he attended." But in response to ADES's objection to this testimony, Sarah did not suggest the evidence was relevant beyond her argument that the ADA generally applied to this case. During oral argument on the state's motion, Sarah stated she "would like to call witnesses from the National Federation for the Blind so that they can discuss the kinds of things that the Department could have done but didn't do."

¶11 But, Sarah's proposed witnesses and evidence only would have established, at most, the availability of additional services related to her disability; but her blindness and any related parenting difficulties were not the basis for termination. As we discuss in detail below, the circumstances supporting the termination of her parental rights were that Sarah had neglected the children for reasons wholly unrelated to her blindness, they had been in foster care for more than fifteen months, and Sarah was unlikely to remedy the situation in the near future. Thus, we cannot say the juvenile court abused its discretion in precluding the ADA-related evidence. *See Kimu P.*, 218 Ariz. 39, ¶ 11, 178 P.3d at 514.

Reasonable Efforts

¶12 Sarah next contends ADES violated her "constitutionally protected substantive due process rights in failing to make a good faith effort to preserve the family."[3] She argues the juvenile court erred in finding ADES had made reasonable efforts because ADES had "failed to follow the recommendations of its own experts," because the case manager did not review the visitation guidelines with her before "abruptly" stopping visitation "without explanation," and because the case manager "fail[ed] to assist [Sarah] in obtaining couples counseling."[4]

¶13 Section 8-533(B)(8) requires that ADES have made "a diligent effort to provide appropriate reunification services" before seeking to terminate parental rights based on the length of time the children have been in care. Reasonable efforts included providing Sarah "with the time and opportunity to participate in programs to help her become an effective parent." *In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353,

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[3]ADES argues Sarah has waived this argument because she failed to raise a constitutional claim below. Although, under certain circumstances, we find waived those arguments not made below, *see Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007), an appellate court "may, in its discretion, address constitutional arguments raised for the first time on appeal," *Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008). In any event, we need not reach the constitutional argument here because we find ADES made reasonable efforts to preserve the family. *See LaFaro v. Cahill*, 203 Ariz. 482, ¶ 16, 56 P.3d 56, 60 (App. 2002) (judicial policy to avoid addressing constitutional issues unless necessary to resolve case).

[4]We do not find particularly helpful ADES's response to this claim, which consists of an eleven-page, almost verbatim repetition of its statement of facts and a conclusory statement that reasonable efforts were made. It provides no actual argument in support of its position and does not specifically address the issues Sarah raises.

884 P.2d 234, 239 (App. 1994). But ADES "is not required to provide every conceivable service or to ensure that a parent participates in each service it offers." *Id.* It is not required to provide services that are futile, *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 18, 83 P.3d 43, 50 (App. 2004), and need only "undertake measures with a reasonable prospect of success," *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 34, 971 P.2d 1046, 1053 (App. 1999).

¶14 The juvenile court's termination order states:

> During the course of the dependency action, [Sarah] failed to take the children to school, allowed the children [to] ride the public bus unattended, interfered with the children's counseling, w[as] involved in domestic violence and failed to maintain a stable home. Despite multiple services made available to [her], [Sarah] failed to participate in family counseling and obstructed opportunities to conduct effective [CFT] meetings. . . . [Sarah]'s inappropriate behavior [during visitation] resulted in its termination. [She] failed to participate in services that would have permitted the resumption of the contact with [her] children. [Her] rude, aggressive and argumentative behavior made numerous efforts to provide [her] services to accomplish reunification ineffective.
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> [Sarah] ha[s] been provided numerous opportunities to remedy the circumstances which caused the out of home placement but ha[s] been unwilling or unable to do so. [Sarah] ha[s] refused couple's counseling . . . . [She] ha[s] been resistant to all assistance and ha[s] been abusive, aggressive and accusatory of those who attempt to work with [her]. . . . [She has] refused to accept responsibility for [her] behavior and believe[s] that [she has] acted appropriately. [Sarah's] failure to acknowledge or rectify the issues which have resulted in the removal of the children and the continuing out of home placement demonstrates the substantial likelihood that [she is] not capable of exercising proper parental control in the near future.

"On review, . . . we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings . . . ." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We do not reweigh the evidence; we "look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C.*, 207 Ariz. 43, ¶ 8, 83 P.3d at 47. We have reviewed the record and find support for each of the juvenile court's findings.

¶15 Sarah nonetheless contends ADES's efforts to reunify the family were insufficient because it failed to follow the recommendations of its experts in providing services related to her disability. ADES may fail to make reasonable efforts when it "neglects to offer [a parent] the very services that its consulting expert recommends." *Mary Ellen C.*, 193 Ariz. 185, ¶ 37, 971 P.2d at 1053. After performing a psychological evaluation of Sarah, Dr. Dee Winsky recommended that Sarah "be provided the full array of services for which she qualifies due to her disability." Sarah contends she never received these services and faults two of her case managers, who stated at the severance hearing that they had not secured disability services for her.

¶16 However, the initial case plan approved by the juvenile court required Sarah to "contact her disability worker regarding services available in the community." In March 2007, the plan was revised to include the requirement that Sarah "remain in contact with her disability worker to request assistance as needed." CPS case manager Rachel Barcelo testified that when she had taken over the case in September 2007, she had reviewed the case plan with Sarah and "asked her several times if there was any extra help she needed and she

always said no." Barcelo also stated the case plan tasks "were discussed with the parents at every CFT[–t]he things that they needed to be doing all along in order to make progress in the case plan." Additionally, Sarah never told Barcelo whether she had been in contact with her disability worker, and she refused to give Barcelo the disability worker's name or any other information about her receipt of disability services.

¶17 Thus, despite being told repeatedly that maintaining contact with and accepting assistive services from the Department of Developmental Disability (DDD) were prerequisites to reunification with her children, Sarah produced no evidence she had done so. Following her evaluation, Winsky reported that Sarah was "not exhibiting symptoms of mental illness . . . or mental deficiency," and she "observed [Sarah] to be an intelligent woman who communicates effectively." There was thus no evident barrier that had precluded Sarah from obtaining "the full array of services for which she qualifie[d]," except for her own unwillingness to seek them. *Cf. Mary Ellen C.*, 193 Ariz. 185, ¶ 35, 971 P.2d at 1053 (criticizing ADES's efforts to assist mother with major mental illness in obtaining "intensive psychiatric services" by merely providing telephone number and encouraging self-referral). "[ADES]'s responsibility has limits. There . . . comes a point when the [juvenile] court must decide whether the natural parent is making a good-faith effort to reunite the family." *In re Maricopa County Juv. Action Nos. JS-4118/JD-529*, 134 Ariz. 407, 409, 656 P.2d 1268, 1270 (App. 1982). Given Sarah's failure to contact her DDD caseworker, as required by the case plan, the juvenile court reasonably could infer that if Sarah had not

received disability services, it was by choice and not because she was unable to secure those services herself.

¶18 Sarah also argues ADES failed to make reasonable efforts because it suspended visitation without warning, did not follow its experts' recommendations for therapeutic visitation, and did not assist her appropriately in obtaining couples' counseling. After the children were removed for the second time in September 2007, Sarah refused to participate in visitation until November. Prior to any visitation, a case aide read the visitation guidelines to Sarah and explained that any discussion with the children about the status or possible outcome of the dependency proceeding would be inappropriate. Nonetheless, on at least four occasions Sarah made inappropriate comments to the children, stating that CPS wanted them to be adopted and instructing them not to discuss anything with their therapist. The children's therapist supervised a visitation session and, after observing the family interaction, informed Barcelo that Sarah's comments were negatively affecting both the children's therapeutic progress and their relationships with their placements. The therapist determined that visitation therefore was not in their best interests, and CPS then suspended visitation.

¶19 At the next CFT meeting, Sarah was told her "negative behaviors [during visitation] negatively impacted the case, and that only seemed to anger [her] more." A family assessment was subsequently conducted by psychologists Dr. Michael German and Dr. Edward Lovejoy, who recommended that Sarah have visits with the children. Believing it "essential that the parents . . . hav[e] contact with their children until some legal decision is made," the psychologists recommended that a therapist supervise the visitation. To facilitate

this, Barcelo contacted Traci Butler, a family therapist, who agreed to provide couples' therapy for Joseph and Sarah and supervise therapeutic visitation with the children.

¶20 Butler and Sarah apparently had difficulty contacting one another. Sarah then began to leave messages telling Butler that Sarah was not "'playing games'" and was going to call the media to tell them Butler was not doing her job and was keeping Sarah and Joseph away from their children. Sarah also told Butler she was in "big trouble" and that Sarah and her attorney were going to come take the children from Butler. Butler then wrote a letter, explaining she would not be able to work with the family. She reported:

> [A]fter many failed attempts and the accusatory messages being left; I felt that it was in this family's best interest for me to remove myself.
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> In twenty years of providing individual and family services, this is the first case that I have ever had to take this kind of position. However, I did not feel that it was in the family's best interest for me to continue forward as I had already developed a biased opinion and did not think it was ethical to provide services under these circumstances.

CPS did not make any additional attempts to establish therapeutic visitation. Under these circumstances, it was reasonable for CPS to suspend visitation.

¶21 Furthermore, contrary to Sarah's argument, Barcelo did not "cho[o]se to ignore the recommendations of Dr. Lovejoy and Dr. German" in favor of reinstating visitation or "fail[] to assist [her] in obtaining couples' counseling." In an attempt to implement the recommendations of therapeutic visitation and couples' counseling, Barcelo contacted Butler and gave her the family's contact information. Butler then called repeatedly in an attempt to arrange services. Sarah never informed Barcelo that she was having difficulties

scheduling services, and when Barcelo spoke with Butler, Barcelo suggested Butler call Sarah's attorney so he could assist in getting the services set up. However, Sarah then became angry and threatening in her voicemail messages, and Butler determined she ethically could not provide services to the family. Thus, the record shows that Barcelo attempted to implement the experts' recommendations and assist Sarah in obtaining couples' counseling and visitation.

¶22 To the extent Sarah contends Barcelo should have made additional efforts after the failed attempt to schedule therapeutic visits and couples' counseling with Butler, it was reasonable for ADES to have concluded that further attempts would be futile. *See Mary Lou C.*, 207 Ariz. 43, ¶ 18, 83 P.3d at 50 (ADES need not provide services that would be futile). While Butler was attempting to schedule these services, Sarah called Barcelo and told her she "no longer want[ed] to fight for her children and was 'giving up on her children and [she] hope[d] CPS ha[d] a fun time giving a blind wom[a]n's children up for adoption." Furthermore, in the report she prepared for the September 2008 permanency hearing, Barcelo stated:

> The major concern that [she] continues to have is [Sarah's] steadfast unwillingness to cooperate with services. [Sarah] ha[s] not made any changes in [her] behavior . . . . [She] continue[s] to be extremely confrontational with service providers and ha[s] essentially exhausted all possibilities for resources. . . .
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> It is also of concern that . . . [Sarah] continue[s] to blame everyone and not take responsibility for [her] actions.

Thus, given that Sarah's behavior was substantially unchanged from the beginning of the dependency through her interaction with Butler more than two years later, there was no

reason for Barcelo to believe that the outcome of any further attempts to provide services would be different.

¶23 In sum, during the dependency, Sarah received in-home family therapy and other services, a psychological evaluation, parenting classes, and a family assessment. She was also referred to her DDD caseworker for services related to her disability, and she was offered visitation, CFT meetings, additional case staffings, couples' therapy, and therapeutic visitation. All of these services were directed at reunification of the family, but Sarah failed to take advantage of most of them. Nor did she object to the juvenile court's successive findings at every dependency review hearing that ADES was making reasonable efforts to reunify the family. Thus, contrary to Sarah's argument, there was ample evidence to support the court's finding that ADES had made diligent efforts to preserve the family. *See Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053.

Best Interests Determination

¶24 Last, Sarah contends ADES failed to "present credible evidence that termination of [her] parental rights is in the minors' best interests" because no evidence was presented that the children would derive a benefit from termination or be harmed by continuing their relationship with Sarah. We disagree. After proving a statutory ground for severance, ADES must also establish by a preponderance of the evidence that termination is in the child's best interests. *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, ¶ 7, 177 P.3d 327, 329 (App. 2008); *see also* § 8-533(B). To meet this burden, ADES "must present credible evidence demonstrating 'how the child would benefit from severance *or* be

harmed by the continuation of the relationship.'" *Lawrence R.*, 217 Ariz. 585, ¶ 8, 177 P.3d at 329. Evidence that the child is adoptable can satisfy ADES's burden, but a determination that the child is adoptable alone does not necessitate a finding that severance is in his or her best interests. *Id.*

¶25 ADES presented substantial evidence that termination was in the children's best interests. At the severance hearing, Barcelo testified that the children were adoptable and that Sarah "at this time cannot safely or effectively parent these children." She also stated that, since their removal from their parents' care, all three boys' behavior and academic performance had improved. And, with respect to Michael, the children's attorney stated during closing argument that

> he very much has come to understand . . . that his parents are . . . perhaps unable to cure the conditions that brought h[im] and his brothers into the care of [ADES]. He now indicates . . . that he very much wants a permanent adoptive home. And he's afraid that his parents can't provide him with that permanency.

She also noted that Adam "would be open to the idea of an adoptive family."

¶26 Thus, contrary to Sarah's argument, ADES did present evidence that severance was in the children's best interests. Although other evidence was presented concerning the children's desire to continue their relationship with Sarah, the juvenile court, as the trier of fact, was "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). We will not reweigh this evidence. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005). Therefore,

we have no basis for vacating the court's finding that severance was in the children's best interests.

Disposition

¶27 For the reasons stated above, we affirm the juvenile court's order terminating Sarah's parental rights to Michael, Isaac, and Adam.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge