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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSELYN A., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and SHALANE A., Appellee.	2 CA-JV 2010-0068 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J143991

Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

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E S P I N O S A, Judge.

¶1 Joselyn A., the mother of Shalane A. who was born in December 2001, challenges the juvenile court's June 2010 order terminating her parental rights on the grounds of abuse or neglect and mental illness and/or a history of chronic substance abuse. *See* A.R.S. § 8-533(B)(2), (B)(3). Joselyn contends that by denying her visitation the Arizona Department of Economic Security (ADES) "prevented [her] from having the ability to demonstrate that she can be a safe and effective parent." She also contends the court's finding that termination of her parental rights was in Shalane's best interest was "premature" and "deficient" because she was not given visitation and did not have the chance to demonstrate she could parent Shalane safely and appropriately. We affirm for the reasons stated below.

¶2 "We view the facts in the light most favorable to sustaining the juvenile court's decision." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). Joselyn's lengthy history of mental illness is well-established. Her condition had been erratic over the years and periods during which she "decompensated" she could not properly care for her two daughters, Shalane and Shalane's older sister, Shayla; the effect of her unpredictable, volatile condition on her children has been significant. In November 2008, Joselyn began to deteriorate. She called police and reported that her fiancé and his sister were threatening to harm her and her daughters and that her fiancé had sexually assaulted her. When officers arrived, she was speaking incoherently and behaving erratically; she refused emergency mental health services and the children were removed from her home. A few days later, a neighbor called police after Joselyn had threatened the neighbor that she would kill her if the neighbor did not stay away from Joselyn's husband. Joselyn, however, was not married.

¶3 ADES filed a dependency petition as to both girls. Shayla had been adjudicated dependent in two earlier dependency proceedings; Shalane had been adjudicated dependent once before. In the most recent dependency petition, ADES alleged, inter alia, that Joselyn "suffers from severe mental illness which impairs her ability to safely care for her children"; that the children had reported Joselyn had "been waking them up in the middle of the night, stating someone [was] after them;" screaming while she was driving the children around in the car; that there was no food in the home; and that, "[i]n the past, when [her] mental health deteriorated, she exhibited violent behavior."

¶4 After a preliminary protective hearing in December 2008, the juvenile court approved concurrent case plan goals of reunification and severance and adoption and ordered that ADES was not to provide further reunification services and that Joselyn was not to have contact with the children without ADES approval. In May 2009, following a contested dependency hearing, the juvenile court adjudicated the children dependent "based on the allegations contained in the petition . . . ." Shortly thereafter, ADES filed a motion to terminate its obligation to provide reunification services, pursuant to A.R.S. § 8-846(B)(1)(f). In that motion, ADES reviewed the family's lengthy involvement with Child Protective Services (CPS) and described Joselyn's chronic mental illness and the resulting abuse and neglect of the children. ADES explained that Joselyn's condition had not improved, despite the array of services with which she had been provided over the years in the previous dependency proceedings. A few weeks later, after a combined permanency/disposition hearing and hearing on ADES's motion, the court changed the case plan goal to severance and adoption, granted ADES's motion to terminate

reunification services, and ordered ADES to file a motion to terminate Joselyn's parental rights. ADES did so, based on abuse or neglect and mental illness and/or a history of chronic substance abuse.[1] *See* § 8-533(B)(2), (B)(3). Following the contested severance hearing, the juvenile court granted ADES's motion and terminated Joselyn's parental rights to Shalane on both grounds. This appeal followed.

¶5 To terminate a parent's rights, the juvenile court must find clear and convincing evidence establishing at least one of the statutory grounds for termination, *see* A.R.S. §§ 8-533(B), 8-537(B), and that a preponderance of the evidence establishes severance is in the child's best interests, *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm a termination order if reasonable evidence supports the factual findings upon which the order is based. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). Here, in its final order, the court entered extensive, thorough findings of fact. Because there is reasonable evidence in the record to support these findings and no purpose would be served by reiterating them in their entirety here, we adopt the court's findings and consider them established as we address the two arguments Joselyn raises on appeal. *See id*. ¶ 16.

¶6 Joselyn first contends the juvenile court erred in terminating her rights because ADES prevented her from having visitation with Shalane "and in the process, prevented [her] from having the ability to demonstrate that she can be a safe and effective

[1]On the first day of the October 2009 severance hearing, the juvenile court dismissed the motion as to Shayla because she was fourteen, her father had entered her life and was participating in services and visitation, and in view of discussions regarding a permanent guardianship.

parent." She argues ADES did not have sufficient information to justify its decision not to allow visitation and did not satisfy its constitutional obligation to preserve the family.

¶7 As ADES points out in its answering brief, after the December 2008 preliminary protective hearing, the juvenile court ordered ADES to "staff the matter for severance and with no reunification services offered." The court also ordered that Joselyn was not to have contact with the children "unless approved by" ADES. Because this order "conclusively define[d] [Joselyn's] rights regarding visitation," it was a final, appealable order. *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 374, 873 P.2d 710, 712 (App. 1994); *see also Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶ 7, 127 P.3d 59, 62 (App. 2006). She did not appeal from that order. Even assuming the order is truly interlocutory in nature, Joselyn could have challenged it by special action; at the very least, she could have asked the juvenile court to reconsider its ruling, raising the constitutional argument she now asserts, or filed a motion demanding visitation. Similarly, she did not challenge the court's order granting ADES's motion to relieve it from its obligation to provide Joselyn with reunification services, pursuant to § 8-846(B)(1)(f). That order also appears to have been a final, appealable order because it resulted in a final decision regarding visitation. *See Maricopa County Juv. Action No. JD-5312*, 178 Ariz. at 374, 873 P.2d at 712 (holding "juvenile court's order terminating visitation is a final order because it conclusively defines appellant's rights regarding visitation of her children"). But again, even assuming that ruling was not appealable,[2]

[2]The order arguably was not appealable because it was part of the permanency hearing ruling and the latter is not an appealable order. *See Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 8, 1 P.3d 155, 158 (App. 2000).

Joselyn did not challenge it by special action, request that the court reconsider it, or file a motion for visitation. Joselyn therefore arguably has waived any objection to the cessation of visitation. *Cf. Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (failure to object to alleged lack of detail in juvenile court's order); *Lee v. Lee*, 133 Ariz. 118, 125, 649 P.2d 997, 1003 (App. 1982) (finding appellate court lacks jurisdiction to address propriety of order when timely notice of appeal not filed after "entry of the order sought to be appealed."). Nevertheless, in our discretion, we address the argument because Joselyn has asserted it within the broader context of her contention that ADES did not satisfy its obligation to provide reunification services.

¶8 Visitation is considered a reunification service. *See Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, ¶ 9, 42 P.3d 1163, 1165 (App. 2002). We note at the outset there is no statutory requirement that ADES provide reunification services when, as here, termination is based on abuse or neglect, pursuant to § 8-533(B)(2). *See* § 8-533(B), (D). Although this court has found an implicit statutory requirement to provide such services when termination is based on mental illness, even then such services are not required when they would have "no reasonable prospect of success." *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 31, 971 P.2d 1046, 1052 (App. 1999). And our legislature, in enacting § 8-846, has expressly acknowledged there are circumstances in which reunification services need not be provided, authorizing the juvenile court to relieve ADES of that statutory obligation when appropriate. The record supports the juvenile court's conclusion that those circumstances existed here.

¶9 In any event, visitation is clearly more than just a service. As Joselyn correctly asserts, parents have a fundamental right to visit and associate with their child, but that right is not without limitation and may be restricted by the juvenile court when it determines, in the exercise of its discretion, that visitation is not in the child's best interest and would endanger the child. *See Michael M.*, 202 Ariz. 198, ¶ 11, 42 P.3d at 1166. In its December 2008 minute entry order following the preliminary protection hearing, the juvenile court stated it had "considered the protection of the children from abuse or neglect as its first priority." The court made clear that its ruling was based on the family's lengthy history of ADES involvement and the "numerous services" with which Joselyn had been provided "in two prior dependencies such as multiple mental health services, substance abuse treatment services, psychiatric and psychological evaluations and case management services." We can infer from the fact that the court granted ADES's motion to terminate reunification services in June 2009, that nothing had occurred in six months since the December 2008 preliminary protective hearing to alter the court's view in that regard; if anything, ADES's allegations in its motion and the evidence presented at the permanency hearing presumably reinforced the court's belief that services, including visitation, would be futile, prompting the court to direct ADES to file the motion to terminate Joselyn's parental rights. Based on the record before us and the factual findings in the court's final termination order, which we have adopted, there was an abundance of evidence that visitation was not in the children's best interests, that they had suffered physical and emotional abuse when in Joselyn's care, and they would have been at great risk for further harm if placed in her care.

¶10 Additionally, even assuming, without deciding, that we were to agree with the court's determination in *Mary Ellen C*, 193 Ariz. 185, ¶¶ 31-32, 971 P.2d at 1052-53, that, at least when termination of a parent's rights is based on mental illness, ADES has a constitutional obligation to provide reunification services, as we previously noted the court in that case acknowledged ADES is not required to provide such services when they would be futile. 193 Ariz. 185, ¶1, 971 P.2d at 1048; *see also Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 20, 219 P.3d 296, 304 (App. 2009). We can infer from the juvenile court's rulings it found further reunification services would have been futile. Based on the record before us and the extensive factual findings we have adopted, that conclusion is well-supported.

¶11 Joselyn's second argument on appeal is related to the first; she asserts that because the court did not permit her to have visitation with Shalane, she did not have the opportunity to establish she could parent appropriately and, therefore, the court's finding that termination of her rights was in Shalane's best interest was premature. She argues, too, that the court's best interest finding was based improperly on "allegations from eight years prior to the severance action."

¶12 Having rejected Joselyn's first argument we necessarily reject the second. The juvenile court did not err in terminating visitation between Joselyn and Shalane or relieving ADES of any duty it had to provide reunification services. Moreover, the court's best interest finding is amply supported by the eight pages of factual findings that precede it. In its order, the court specified in great detail the harm Shalane had suffered while in Joselyn's care and the instability that resulted from a lifetime of having "been involved in the dependency system off and on since birth." The court found a

preponderance of the evidence established that terminating Joselyn's parental rights "would further the plan for adoption," that Shalane needs "a permanent home," and that Joselyn cannot care for her because of Joselyn's "unaddressed mental health issues and history of neglecting the child."

¶13 To establish termination of a parent's rights is in a child's best interests, the petitioner must establish the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 334, ¶ 6, 100 P.3d 943, 945 (App. 2004); *see also In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Implicit in the juvenile court's order is the conclusion it would be deleterious to Shalane for the relationship to continue and termination will be beneficial. The record is replete with evidence that supports this conclusion, which was neither erroneous nor premature. For example, the case manager testified Shalane would be "at risk for substantial abuse and neglect" if returned to her mother. She stated Shalane's current placement wished to adopt her and freeing her for adoption would be the best thing for her, particularly given her age and her need for permanency and stability. Psychologist Ralph Wetmore, who evaluated Joselyn in 2002 and again in January 2010, testified Joselyn's mental health problems will continue throughout her life, with periods of functionality followed by decompensation, which would directly affect any children with whom she was living. And psychologist Daniel Overbeck conducted a bonding and attachment evaluation and testified about the devastating effects of Joselyn's erratic, unpredictable behavior on a child of Shalane's age, who is trying to "form a sense of order in the world."

¶14 For the reasons stated here, we affirm the juvenile court's order terminating Joselyn's parental rights to Shalane.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge