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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, Appellant, v. DONNIE D., HEATHER P., JAISON B., JAKOB D., and JORDAN D., Appellees.	2 CA-JV 2010-0066 2 CA-JV 2010-0067 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18690000

Honorable Joan L. Wagener, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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Attorneys for Appellant

Jacqueline Rohr — Tucson
Attorney for Appellee Heather P.

Bernice Little — Tucson
Attorney for Appellee Donnie D.

E S P I N O S A, Judge.

¶1 In this consolidated appeal, the Arizona Department of Economic Security (ADES) challenges the juvenile court's May 27, 2010, order denying ADES's motion to terminate Donnie D.'s and Heather P.'s parental rights to their children, Jakob D., born in July 2006, and Jordan D., born in September 2007, and Heather's rights to her son, Jaison B.,[1] born in June 1997. ADES asserts it made diligent efforts to provide appropriate reunification services, the parents were unable to remedy the circumstances causing the children to remain in a court-ordered, out-of-home placement for longer than fifteen months, and it established that terminating the parents' rights was in the children's best interests. *See* A.R.S. § 8-533(B)(8)(c). Because the record contains reasonable evidence to support the court's ruling, we affirm.

¶2 Before it may terminate a parent's rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). The juvenile court as the trier of fact in a termination proceeding is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). We therefore accept the juvenile court's findings of fact "unless no reasonable evidence supports those findings" and will affirm its severance order unless the order is clearly erroneous. *Jennifer B. v.*

[1]Jaison's father is not a party to this appeal.

Ariz. Dep't of Econ. Sec., 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶3 In 2000, Child Protective Services (CPS) received a report that Donnie had sexually abused his then four-year-old daughter by "kiss[ing] her vagina."[2] After Donnie admitted this conduct to officers at the Pima County Sheriff's Department, ADES substantiated the report of sexual abuse. In January 2007, CPS received a report that Donnie had hit then six-month-old Jakob. In the meantime, Donnie had been offered multiple services in the ongoing dependency proceeding related to his other children. That dependency was closed in November 2009, and those children were reunified with their mother. In May 2008, while the other dependency was ongoing, CPS received a report that then twenty-two-month old Jakob was at the hospital with two fractures in his left arm in "various stages of healing." Heather had refused treatment for Jakob, and neither Donnie nor Heather were able to explain Jakob's injuries. ADES filed a dependency petition in May 2008, and the children were declared dependent as to the parents three months later; the court ordered a case plan goal of family reunification. Jaison was placed with the maternal grandmother and Jakob and Jordan were placed in separate foster homes.

¶4 The parents were provided numerous services, including psychological evaluations; drug testing; therapy; supervised visitation; transportation; parenting classes;

[2]Donnie reported to CPS that he has five other children, three of whom were in CPS's custody due to an open dependency during the dependency in this matter, and one of whom was the victim in the sexual abuse incident.

and neuropsychological and updated psychosexual evaluations on Donnie, along with the opportunity for polygraph testing. In February 2009, the court approved a concurrent case plan goal of family reunification and severance and adoption; in September, the court changed the plan to severance and adoption. The following month, ADES filed a motion to terminate Heather's rights to all three children, and Donnie's rights to Jakob and Jordan, alleging as grounds for termination that the children had been in an out-of-home placement for more than fifteen months, the parents had been unable to remedy the circumstances that caused the placement, and termination was in the children's best interests. *See* § 8-533(B)(8)(c). Following a six-day contested severance hearing, the court denied ADES's motion to sever Donnie's and Heather's rights to the children.

¶5 Psychologist Philip Balch had evaluated Donnie in 2007 as part of the ongoing dependency involving his other children. Balch had recommended Donnie take a confirmatory polygraph test to determine whether sex-offender treatment was needed and to address potential safety issues in light of ADES's substantiated finding that Donnie had molested his daughter. In September 2008, Balch performed a psychological evaluation and an updated psychosexual evaluation on Donnie as part of the instant dependency proceeding. Although Balch had "no new recommendations regarding the sexual issues given that [Donnie] ha[d] not followed through with any of the prior recommendations and there [was] no new information," he did recommend that Donnie take a confirmatory polygraph test regarding Jakob's physical abuse.

¶6 ADES scheduled Donnie for three polygraph tests during the course of the two dependency proceedings. He failed to appear for the first one in August 2007, which

was intended to address the sexual abuse issue. Having smoked marijuana the day before the second test in December 2008, Donnie could not complete that test, which was intended to address the physical and sexual abuse issues.[3] Although Donnie completed the third test in March 2009, which addressed the physical abuse issue, the results were "inconclusive." The polygraph test examiner, Sandra Gray, reported she believed the results were inconclusive because Donnie "may have employed some type of mental countermeasures on his Zone of Comparison examination, thus producing the rather flat physiological responding." At the severance hearing, when asked whether it would be "fruitful" to reexamine an individual with an inconclusive polygraph result, Gray opined "there would [be] no problem with him undergoing another exam." In addition, Balch testified if a polygraph were inconclusive "because the person has characteristics which make[] a polygraph not feasible, then I don't think you rerefer. If it's inconclusive because the person was going out of their way to fake the results[,] was inebriated, [or] was uncooperative, then you might very well want to have a polygraph readministered." CPS case manager Amanda Cannon testified she did not reschedule another polygraph for Donnie after the inconclusive test result because Gray had informed her "once a polygraph has been deemed to be . . . inconclusive . . . that a second one would show the exact same thing."

¶7 In its ruling denying ADES's motion to terminate the parents' rights, the juvenile court concluded it could not find that "ADES [had] made diligent efforts to

[3]Because only one issue could be tested at one time, the decision was made to address the physical abuse allegations in the second polygraph test.

provide appropriate remedial services to the family" for the following reasons: Balch had recommended a confirmatory polygraph relating to the substantiated allegation of sexual abuse by Donnie; recommendations relating to Donnie's treatment hinged upon the results of a polygraph test that never occurred; and ADES incorrectly believed no future polygraph examination would be fruitful. On appeal, ADES argues that no reasonable evidence supports the court's finding that ADES did not make diligent efforts to provide the parents with appropriate reunification services. ADES also asserts that, because it followed Balch's recommendation when it scheduled a polygraph to address the sexual abuse issue, and because Donnie elected not to avail himself of that test, ADES satisfied its statutory duty to provide appropriate services. *See In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994) (ADES not required to ensure parent participates in every service offered).

¶8 No purpose would be served by restating the juvenile court's ruling in its entirety. Rather, because there is reasonable evidence to support the court's findings of fact and because we see no error of law in its order, we adopt it. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d 203, 207-08 (App. 2002), *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Although the evidence also would support a finding that ADES had provided diligent services, we do not substitute our assessment of evidence for the juvenile court's. *In re Pima County Juv. Severance Action No. S-2698*, 167 Ariz. 303, 307, 806 P.2d 892, 896 (App. 1990). Additionally, in light of our ruling, we need not address ADES's argument that severance is in the children's best interests.

¶9 Accordingly, we affirm the juvenile court's order denying ADES's motion to sever the parents' rights to Jakob and Jordan, and Heather's rights to Jaison.

/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