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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BERNADETTE L., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, DANITZA R., and NETANYA M., Appellees.	2 CA-JV 2008-0104 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18127800

Honorable Virginia C. Kelly, Judge

AFFIRMED

Child Advocacy Clinic
By Paul D. Bennett, a clinical professor appearing under Rule 38(d), Ariz. R. Sup. Ct., and Christy Locher and Deirdre Smith, students certified pursuant to Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorneys for Appellant

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Phoenix
Attorneys for Appellee Arizona Department of Economic Security

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H O W A R D, Presiding Judge.

¶1 Bernadette L. appeals from the juvenile court's order of October 1, 2008, terminating her parental rights to two of her children, Danitza R. and Netanya M., on grounds of Bernadette's mental illness, *see* A.R.S. § 8-533(B)(3),[1] and the length of time the children had spent in a court-ordered, out-of-home placement, *see* § 8-533(B)(8)(b).[2] Bernadette challenges the sufficiency of the evidence to sustain the court's factual findings and contends the court erred by terminating her parental rights on the basis of "a diagnosis revealed for the first time at trial." We affirm.

¶2 Before it may terminate a parent's rights, a juvenile court must find by clear and convincing evidence the existence of at least one statutory ground for severance and must find by a preponderance of the evidence that terminating the parent's rights is in the child's best interests. *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). On review, we "accept the juvenile court's findings

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[1]To justify severance pursuant to § 8-533(B)(3), the state was required to prove in this case that Bernadette "is unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period."

[2]Although subsection (B)(8)(b) has since become subsection (B)(8)(c) as the result of a 2008 amendment to § 8-533(B), *see* 2008 Ariz. Sess. Laws, ch. 198, § 2, we refer to it in this decision as it was designated in the order terminating Bernadette's parental rights. Termination pursuant to this subsection requires proof that the children had been cared for in an out-of-home placement pursuant to court order for a cumulative period of fifteen months or longer, that Bernadette had been unable to remedy the circumstances that cause the children to remain in care, and that "there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future."

of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). If sufficient evidence supports any one of the statutory grounds alleged for termination, we need not consider arguments pertaining to other grounds alleged. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000).

¶3 Viewed in the light most favorable to sustaining the juvenile court's ruling, *see Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), the evidence established that Danitza, born in 2002, and Netanya, born in 2006, are the second and fourth of four children born to Bernadette between 1998 and 2006, each fathered by a different man. In February 2007, Child Protective Services (CPS) removed the children from the home Bernadette shared with Netanya's father, Daniel M., after her third child, two-year-old Enrique, was taken to a hospital because he had ingested cocaine at home.[3] A subsequent investigation revealed a "residue of drugs" in the home as well as a loaded gun and one or more knives, all of which were "unsecured and accessible to the children." The investigators also learned that Bernadette and Daniel had "a history of severe domestic violence" and that Daniel had "quite a criminal history involving drugs and guns."

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[3]As the result of Enrique's exposure to cocaine, Bernadette pled guilty to one misdemeanor count of contributing to the dependency of a minor and was placed on three years' probation in February 2008. Charged as a codefendant in the same case, Daniel pled guilty to one count of failing to report child abuse, an undesignated class six felony, and was similarly placed on probation for three years. The conditions of their probation prohibited Bernadette and Daniel from having contact with each other or "the victims" without prior approval of the probation department.

¶4 The children were adjudicated dependent as to Bernadette in March 2007, and the juvenile court approved a case plan goal of family reunification. Toward that end, the Arizona Department of Economic Security (ADES) promptly offered Bernadette an array of services, including a substance abuse assessment, drug screening, a psychological evaluation, individual and couples counseling, Child and Family Team services, anger management and domestic violence classes, supervised visitation, a case aide, home visits, and case management services.

¶5 Bernadette did not begin making a serious effort to comply with her case plan tasks until approximately October 2007. At a permanency hearing held in February 2008, the juvenile court found she was then in compliance and granted a request by ADES to give her an additional ninety days to participate in services before the court made its permanency determination. At the continued permanency hearing in May, however, the court found her only partially compliant with the case plan. It denied Bernadette's request for still more time "to demonstrate that she can parent" and ordered the case plan goal changed to severance and adoption. As directed, ADES filed a motion to terminate Bernadette's parental rights to Danitza and Netanya. The contested severance hearing took place over four days between July 15 and August 19, 2008.

¶6 Following the termination hearing, the juvenile court issued a comprehensive minute entry ruling explaining its conclusion that ADES had proved both of the statutory grounds alleged in its motion by clear and convincing evidence and had established by a preponderance of the evidence that terminating Bernadette's parental rights was in the

children's best interests. The court's central factual finding, pertinent to both statutory grounds for severance,[4] was that Bernadette suffers from a serious and persistent mental illness in the form of a dependent personality disorder that "interferes with her ability to discharge her parental responsibilities."

¶7 Psychologist Michael German evaluated Bernadette, Daniel, and the family at the request of CPS. Testifying at the termination hearing, he described Bernadette as

> in a sense . . . kind of a tragic figure. Everybody that I talked to . . . says she's very good with her children. It's clear her children love her. She was very good with the children, but she has a personality—she has a history that causes her to get into the kind of dependent, dysfunctional relationships, and the one she has with [Daniel] is probably the epitome of that,[5] and it's clear over time she chose to maintain that relationship, that was not at all in her children's interest, over taking care of her children[. S]o she's a person who has parenting skills and she has nurturing ability but she is so caught up in this relationship, and there will probably be others after that, to where she loses herself and isn't available to parent her children.

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[4]The factual and legal issues pertinent to the termination of Bernadette's parental rights under §§ 8-533(B)(3) and 8-533(B)(8)(b) overlap considerably, but the two grounds are distinct—a distinction not carefully drawn in Bernadette's opening brief. Because we find the statutory requirements for severance pursuant to § 8-533(B)(3) have been satisfied, we do not address those portions of Bernadette's arguments that appear to pertain to the alternative ground of § 8-533(B)(8)(b). *See Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687.

[5]By Bernadette's own description, Daniel is "a crackhead." The evidence established that he is "volatile," continually angry, and "has tremendous problems with impulse control." Therapist Jean Wortman described his "anger issues and aggression" as more extreme than even the top ten percent of her clients. According to Dr. German, Daniel's behavior is "very unpredictable" and frequently inappropriate, so that "anybody around [him] is at risk [from] his behavior." With the possible exception of Netanya, Bernadette's children were all afraid of Daniel, as were "the majority of the family," who considered Daniel a "loose cannon" and declined to act as placements for the children because they believed "there would be trouble from [him]" if they did.

Explaining specifically how Bernadette's dependent personality disorder affects her ability to parent, German stated:

> [It's] what she brings into her life, what she brings into her children's lives, the domestic violence, the instability, the substance abuse either by herself or her partner, the loss of jobs, the loss of continuity and stability. She loses that ability to nurture her children by being caught up in dysfunction in her adult romantic life.

¶8 Based on Dr. German's testimony and that of Bernadette's therapist, Jean Wortman, the juvenile court found:

> Mother's mental health professional diagnosed her with a dependent personality disorder and depression and indicated that both issues would have to be addressed in order for her to create a safe environment for her children. Mother's relationship with [Netanya's father, Daniel M.] included domestic violence and this caused great instability in her life. Dr. German stated that Mother was caught up in the dysfunction of her life. She participated in therapy during a portion of the case plan but dropped out in May 2008. Dr. German opined that Mother will not change because there were no signs of change in the past year while she was involved in this dependency case, even though she had many services available to help her, including medication [for her depression].

¶9 The record fully supports the juvenile court's findings, both as to the existence and severity of Bernadette's dependent personality disorder and the likelihood that her resulting inability to parent will persist. As the court found and the record reflects, eleven months after the children had been removed from the home, Bernadette was badly beaten by Daniel in January 2008 during an episode of domestic violence that sent her to an emergency room where she received stitches to her face. She had visible bruises on her face and one arm, she reported having bruising on her back, and one side of her head was sufficiently

swollen that her case manager advised her "to go get an x-ray . . . because it looked very concerning."

¶10 Not only did Bernadette refuse to press charges against Daniel for that incident but she did not end their relationship. They arrived together at the family psychological evaluation Dr. German performed shortly after the assault. At that session, German testified, Bernadette at first refused to talk about the beating, then "she said something that was classic about a dependent personality, she said she provoked him, it was her fault, she provoked [him]." As German further explained: "She took responsibility for his aggressive behavior. That's her part in that dance, is that she makes excuses for him. She finds reasons why she shouldn't leave him because she deserved it. She made him do those things to her."

¶11 In March or April 2008, Bernadette's case manager happened to see her and Daniel together in a vehicle—despite the court orders prohibiting contact between them, despite the case manager's having told Bernadette she needed to "stay away from Daniel" if she wanted to get her children back, and despite her verbal assurances that she was not having contact with him. After Daniel's arrest on April 24, 2008, on unrelated charges,[6] the case manager later learned that Bernadette was also visiting him in jail.

¶12 In short, the evidence amply supported the juvenile court's finding that Bernadette "has a mental illness in the form of a personality disorder . . . that . . . interferes

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[6]According to an interim complaint and related indictment admitted in evidence, Daniel allegedly went to a home on April 21, 2008, to collect a drug debt. There he shot a person who was taken to the hospital with a gunshot wound to the chest. Daniel was charged with two counts of aggravated assault and one count of possessing a deadly weapon as a prohibited possessor.

with her ability to discharge her parental responsibilities." And her unwillingness or inability to end her destructive relationship with Daniel at any point over the eighteen-month duration of the dependency proceeding, despite having lost custody of her children in February 2007 and despite having received extensive reunification services, supported the juvenile court's conclusion that the "condition" that was preventing her from "discharg[ing her] parental responsibilities" was likely to persist "for a prolonged indeterminate period." § 8-533(B)(3).

¶13 Bernadette argues that she had completed a number of the tasks assigned in her case plan, having "successfully dealt with her drug problem[,] . . . tested clean[,] . . . attended therapy[,] . . . found a job[,] . . . [and] obtained housing," and she challenges the adequacy of the factual information on which Dr. German based his opinions at the hearing. In essence, Bernadette is asking us to reevaluate and reweigh the evidence below, which this court does not do. That is the province of the juvenile court as the finder of fact. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207 (we defer to juvenile court to determine witness credibility, evaluate evidence, and resolve conflicts). Our function is only to ensure that the record supports the lower court's findings. *See Lashonda M.*, 210 Ariz. 77, ¶ 13, 107 P.3d at 927 (appellate court does not reweigh evidence but determines only if judgment supported by substantial evidence).

¶14 Bernadette also contends the juvenile court erred in terminating her rights "based on a diagnosis revealed for the first time at trial." Although Dr. German testified at the termination hearing that Bernadette had a "full-blown dependent personality disorder," he stated in the written report of his October 2007 psychological evaluation of Bernadette

that she had an Axis II diagnosis of "Possible Dependent Personality Disorder"—qualified, he later testified, only because he had lacked sufficient information at that point to make the diagnosis unequivocally. After observing her further at the family evaluation session three months later, however, German made additional observations that allowed him to confirm the diagnosis. As if there were a substantive difference between her suspected, "possible" diagnosis and the same diagnosis once confirmed, Bernadette contends ADES had not given her proper notice of the "problem," and the severity of the problem, that she needed to resolve in order to regain custody of her children.

¶15 We are not persuaded by Bernadette's argument, which she does not support with legal authority. Regardless of whether her dependent personality disorder was merely suspected or the diagnosis had been formally confirmed, its practical significance was the same; each identifies a mental disorder that prevented her from discharging her parental duties. In terms of Bernadette's case plan tasks, she needed to end her relationship with Daniel, as her case manager had made clear to her. In addition, she needed to obtain treatment for her depression, address the root causes of her emotional dependency on men, and ultimately become able "to parent without depending on somebody else." She was unable to do so. We therefore reject her assertion of error.

¶16 Last, Bernadette contends the juvenile court's finding that she was unable to parent Danitza and Netanya was inconsistent with its "ha[ving] allowed her to parent two of her children," Marialena and Enrique, whom she disingenuously asserts had been "returned to her." She maintains "the court must offer some explanation of how the same parent could

be approved to care for two children but be so unstable that she could not care for her other children." Otherwise, she claims, "[w]ithout addressing those facts, a finding cannot be sustained by clear and convincing evidence." Bernadette argues "she has made a prima facie rebuttal of the conclusion that she has not been able to resolve the problem that led to the [children's] removal." *See generally* § 8-533(B)(8)(b).

¶17 ADES responds that Bernadette's assertions are "factually incorrect" in that her children have not been "returned to her." In March 2008, the juvenile court approved a custody and parenting agreement reached in mediation between Bernadette and Nelson V., the father of Bernadette's ten-year-old daughter Marialena. The agreement and order give primary physical custody of Marialena to Nelson but allow Bernadette parenting time every other weekend during school months and considerably more custodial time in the summer. In June, the court granted ADES's motion to dismiss the dependency as to Marialena. In May 2008, the court dismissed the dependency as to then-three-year-old Enrique after approving an agreement placing Enrique in the sole legal custody and primary physical custody of his father. That agreement and order give Bernadette parenting time for forty-eight hours every other weekend and four additional hours during the week.

¶18 As counsel for ADES noted at the severance hearing, the dependency proceeding was dismissed as to Marialena and Enrique because they no longer met the definition of dependent children. That is, both by then had a father willing and able to exercise "proper and effective parental care and control." A.R.S. § 8-201(13)(a)(i). As the case manager testified, ADES in that situation assumes that the father, as the parent having

custody in each case, would protect the child if inappropriate behavior by Bernadette placed either child at risk. Thus, for ADES to have sought dismissal of the dependency proceeding as to those children, approved their being placed in their fathers' primary physical custody, and endorsed a modifiable plan that gave Bernadette parenting time with Marialena and Enrique was not tantamount to a determination by ADES that Bernadette was a fully appropriate parent. Nor, as the case manager agreed, did those arrangements for Marialena and Enrique "in any way spill over or affect the Department's opinion about whether [Bernadette] can . . . parent and protect Netanya and Danitza," who were still legally dependent. *Cf. Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 12, 178 P.3d 511, 514 (App. 2008) (evidence regarding child born during severance proceeding not relevant in determining whether severance in best interests of older siblings).

¶19 None of the issues Bernadette has raised on appeal warrants reversal of the juvenile court's ruling. Because reasonable evidence supports the court's factual findings and its order is not clearly erroneous, *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998), we affirm it.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge