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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

REBECCA W., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ISABELLE W., Appellees.	2 CA-JV 2008-0111 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18304600

Honorable Ted B. Borek, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 In this appeal, Rebecca W., mother of Isabelle W., born in November 2006, challenges the juvenile court's order of October 15, 2008, terminating her parental rights to Isabelle on the grounds of neglect or abuse, A.R.S. § 8-533(B)(2), and length of time in care, § 8-533(B)(8)(a) (nine months or longer).[1] Rebecca asserts there was insufficient evidence to support the court's order and that the court erred by permitting one witness to testify over her objection and by considering certain evidence. For the reasons stated below, we affirm.

¶2 Seven-month-old Isabelle was taken to a hospital on June 30, 2007, with a variety of injuries. The Arizona Department of Economic Security (ADES) removed Isabelle from her mother's custody and filed a dependency petition alleging that Rebecca's boyfriend had "hit Isabelle, causing numerous bruises on her face, back and arms" and that Rebecca waited until the following day before taking Isabelle to the hospital. ADES further alleged that, in addition to the injuries already described, Isabelle's left arm was fractured and she was suffering from failure to thrive. ADES also alleged that, after Rebecca and her boyfriend had argued in May, he had thrown Isabelle at her and then choked Rebecca; that Rebecca had admitted to police officers her boyfriend had tossed Isabelle at her but later denied to Child Protective Services (CPS) that this had occurred. ADES further asserted Rebecca did "not appear able to protect Isabelle." At a settlement conference in August 2007, Rebecca denied the allegations of the petition but agreed to submit the matter to the

[1]The version of § 8-533 in effect at the time the state filed the motion for termination is the same in relevant part as the current version. *See* 2007 Ariz. Sess. Laws, ch. 156, § 1.

juvenile court, which adjudicated Isabelle dependent. The court approved the case plan goal of reunification.

¶3 After a dependency review hearing in December 2007, the juvenile court found Rebecca was in partial compliance with the case plan, the case plan goal of reunification continued to be appropriate, and ADES had been providing appropriate services and making reasonable efforts to reunify the family. At a dependency review hearing in March 2008, the court again found Rebecca in partial compliance with the case plan, noting the kinds of services she had participated in and those she would continue to receive and characterizing ADES's efforts as reasonable and the services appropriate.

¶4 In June 2008, ADES filed a motion for termination of Rebecca's parental rights based on neglect or abuse and length of time in care (nine months or longer). After a contested hearing in September 2008, the juvenile court terminated Rebecca's parental rights to Isabelle on both grounds ADES alleged in its motion. We will not disturb a juvenile court's order terminating a parent's rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). In assessing the propriety of the order, we view the evidence in the light most favorable to upholding the factual findings upon which the order is based. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). We do not reweigh the evidence; we only determine whether the record contains reasonable evidence to support those factual findings. *See id*. As Rebecca correctly notes, the petitioner in a proceeding to sever parental rights

must prove any statutory ground alleged by clear and convincing evidence. *See* A.R.S. § 8-537(B). We will affirm an order terminating a parent's rights as long as at least one statutory ground has been sufficiently proved. *See Michael J.*, 196 Ariz. 246, ¶ 12, 995 P.2d at 685; *see also Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 18, 152 P.3d 1209, 1212 (App. 2007).

¶5 Rebecca first contends the evidence was not clear and convincing that she had neglected or willfully abused Isabelle, making the termination of her parental rights pursuant to § 8-533(B)(2) improper. She argues the testimony of CPS investigative caseworker Cindy Yates about the nature of Isabelle's injuries when she arrived at the hospital in June 2007 and about the child's failure to thrive and developmental delays was not enough to establish those facts, even though Yates had based her testimony on her review of the medical records and conversations with hospital personnel and family members. Rebecca suggests the evidence was insufficient because "[n]o doctors or medical personnel were brought in to testify as to the nature, cause and/or effect, or severity of [Isabelle]'s injuries. Further, no criminal charges were filed. Finally, there was no testimony by any party as to any permanent damage . . . ." Additionally, although Rebecca concedes she delayed seeking medical attention for twenty-four hours, she asserts, "Yates testified . . . there was nothing in the record suggesting that this delay was a problem for the child."

¶6 Section 8-533(B)(2) provides that a parent's rights may be terminated if the evidence establishes "the parent has neglected or wilfully abused a child. This abuse

includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child." Section 8-201(2), A.R.S., defines abuse, in relevant part, as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement" or of "serious emotional damage."[2] "'Neglect' or 'neglected' means the inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child's health or welfare . . . ." § 8-201(21).

¶7 In its order terminating Rebecca's parental rights, the juvenile court accurately summarized salient portions of Yates's testimony and the report she had prepared for the preliminary protective hearing. As the court noted, from reviewing the medical records, Yates had learned that

> Isabelle . . . had a buckle fracture of her arm, broken blood vessels in her eye, and numerous bruises to her face, chest, back, and arms in various stages of healing. The doctor had diagnosed failure to thrive, developmental delays, and suspected non-accidental trauma. Ms. Yates spoke to the mother who also had special needs. The mother reported that on June 29, she heard the baby crying and saw her boyfriend . . . hit the minor in the face five times and throw the baby at her. The baby went to sleep, and the next day the mother saw the bruises. When interviewed on July 2, the mother said on June 29 her boyfriend pulled the baby's arms and hit the mother and baby several

[2]The version of § 8-201 in effect when the state filed its termination motion is the same in relevant part as the current version. *See* 2003 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 6, § 1.

> times. The mother said she was afraid and could not defend herself. Later in the evening the boyfriend bathed the baby, the mother had a cell phone and could have called for help or left their apartment, but she did not. On June 30, about 1:10 p.m. after her boyfriend left the apartment, she called a friend. The friend called the maternal grandparents who got the minor to the hospital.

¶8 In the remaining portions of its lengthy minute entry, the juvenile court noted and summarized the testimony of other witnesses and considered evidence that established, among other things, Rebecca had failed to protect Isabelle from harm by Rebecca's boyfriend. The evidence also established, as the court found, Rebecca's failure to bond with the child, as demonstrated by the fact that she had not immediately sought medical attention for Isabelle, but had waited until the day after her boyfriend had hit Isabelle before calling a friend rather than the police; the incident that resulted in Isabelle's hospitalization had not been the family's first incident of domestic violence; Isabelle's diagnosis at the hospital as suffering from failure to thrive and Rebecca's lack of recognition of the seriousness of that condition; and Rebecca's admission in March 2008 that she might have broken Isabelle's arm.

¶9 Based on the evidence that the juvenile court reviewed with great specificity, it found Isabelle had been neglected and abused and that the "abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child." The record, which included the evidence we have noted, amply supports this finding and establishes Isabelle had indeed been seriously

injured, refuting Rebecca's assertion that Isabelle's "medical issues . . . did not rise to the level required by A.R.S. § 8-533(B)(2)." Rebecca cites no support for the proposition that expert medical testimony was necessary to establish the nature and seriousness of those injuries. Yates had reviewed the medical records and spoken to medical personnel and family members in connection with her investigation of the case. She gathered that information in preparing her report and relied on it in concluding Rebecca had exposed Isabelle to the risk of abuse and likely would continue to do so if Isabelle remained in the home with Rebecca. It was for the juvenile court, not this court, to determine how much weight to give Yates's testimony. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207.

¶10 We need not address Rebecca's implicit argument that ADES failed to establish Isabelle's failure to thrive was sufficiently serious to independently support a finding of neglect or abuse under § 8-533(B)(2). There was ample other evidence establishing those elements of the statute.

¶11 Rebecca next argues that, even if the evidence was sufficient to sustain the juvenile court's finding that Isabelle had been neglected or abused, there was nevertheless insufficient evidence to support the termination of her parental rights. Relying on the decision by Division One of this court in *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), she asserts ADES was required to make diligent efforts to provide her with appropriate reunification services and failed to do so.

¶12 There is no express requirement in § 8-533(B)(2) that a juvenile court must find ADES diligently provided a parent with reasonable and appropriate reunification services before the court may terminate that parent's rights under that subsection. Even assuming this court agreed with Division One's decision in *Mary Ellen C.*, we do not believe it requires us to infer such a requirement exists when termination of a parent's rights is based on neglect or abuse under § 8-533(B)(2). In *Mary Ellen C.*, the mother's rights were terminated based on mental illness, pursuant to § 8-533(B)(3). The court reasoned that there existed in § 8-533(B)(3) "a statutory requirement that implicitly incorporates the obligation to make *reasonable* efforts to preserve the family before seeking a severance on mental illness grounds." 193 Ariz. 185, ¶ 31, 971 P.2d at 1052 (emphasis in original). Quoting that subsection, the court stated, "[T]he statute permits a severance only if the illness renders the parent 'unable to discharge the parental responsibilities . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.'" *Id.*, *quoting* § 8-533(B)(8). The court found it "inherent within this requirement that the condition be proven not to be amenable to rehabilitative services that could restore a mentally ill parent's ability to care for a child within a reasonable time." *Id*. The court adopted the same reasoning in *Mary Lou C. v. Arizona Department of Economic Security*, 207 Ariz. 43, ¶ 15, 83 P.3d 43, 49 (App. 2004). But the mother's rights in that case were also terminated pursuant to subsection (B)(3), based on her chronic substance abuse, rather than mental illness. *Id*. ¶ 14.

¶13 Termination based on neglect or abuse is far more analogous to termination based on abandonment pursuant to § 8-533(B)(1). And in *Toni W. v. Arizona Department of Economic Security*, 196 Ariz. 61, ¶¶ 10-11, 993 P.2d 462, 465-66 (App. 1999), Division One distinguished *Mary Ellen C.*, reasoning there is no statutory requirement, express or implied, that a court must find ADES had diligently provided a parent with reasonable reunification services when termination of the parent's rights is based on abandonment.

¶14 The interpretation of a statute is a legal question that we review de novo. *See Ariz. Dep't of Econ. Sec. v. Ciana H.*, 191 Ariz. 339, ¶ 11, 955 P.2d 977, 979 (App. 1998). Our primary purpose in interpreting a statute is to determine and effectuate the legislature's intent, mindful that the best reflection of that intent is the plain language of the statute. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 540 Ariz. Adv. Rep. 6, ¶ 9 (Ct. App. Sept. 30, 2008). Like subsection (B)(1), subsection (B)(2) contains no requirement that the court find ADES diligently provided appropriate reunification services to a parent who has abused and neglected a child. § 8-533(B). Perhaps most reflective of the legislature's intent in this regard is its amendment of the statute in 2000, after *Mary Ellen C.* and *Toni W.* were decided, to add subsection (D) to § 8-533. 2000 Ariz. Sess. Laws, ch. 369, § 5. That subsection provides: "In considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification services to the parent and the participation of the parent in these services." Had the legislature wanted to engraft this requirement onto subsection (B)(2) or any other subsection, it could have done

so. *See Schuck & Sons Constr. v. Indus. Comm'n*, 213 Ariz. 74, ¶ 26, 138 P.3d 1201, 1207 (App. 2006); *see also Champlin v. Sargeant*, 192 Ariz. 371, ¶ 16, 965 P.2d 763, 766 (1998) (applying doctrine of *expressio unius est exclusio alterius* which means expression of one item implies exclusion of others). Although evidence about the services offered to a parent and the parent's participation in and benefit from such services would be relevant in determining whether terminating the parent's rights is in the child's best interests, it is not an element of § 8-533(B)(2).[3]

¶15 In any event, even if there were such a requirement, there was ample evidence to support the juvenile court's finding, made in connection with its termination of Rebecca's rights pursuant to § 8-533(B)(8)(a), that ADES had diligently provided reasonable services designed to reunify Rebecca and Isabelle.[4] Rebecca's assertion that ADES failed to provide Rebecca with individual counseling, as psychologist Lorraine Rollins had suggested, "until after nine months had passed" since Isabelle's removal from the home, is irrelevant to the termination of Rebecca's rights pursuant to § 8-533(B)(2). The nine-month period is only significant when the severance is based on § 8-533(B)(8)(a). The record contains abundant evidence to support the finding that ADES had provided Rebecca with services designed to

[3]We need not address whether there is a constitutional basis for inferring such a requirement because Rebecca has not made that argument. Even assuming she has made that argument by merely relying on *Mary Ellen C.*, for the same reason the court rejected that contention in *Toni W.*, so, too, do we. *See Toni W.*, 196 Ariz. 61, ¶¶ 13-15, 993 P.2d at 466-67.

[4]We note that the juvenile court made this finding repeatedly over the course of the dependency, and Rebecca never challenged it.

address the issues that contributed to her neglect of Isabelle, her possible direct abuse of the child, and her failure to protect Isabelle from abuse by Rebecca's boyfriend. Those services ultimately did include individual counseling with Terry Stoe-Bedoya. And Stoe-Bedoya testified that Rebecca would not have benefitted, even had the individual counseling begun any earlier than it did. Although it is somewhat disturbing that there were delays in getting certain services to Rebecca and that she was not provided individual counseling before group therapy as Dr. Rollins had strongly recommended, individual counseling and various other services were ultimately provided.

¶16 As we previously stated, it was for the juvenile court to assess the evidence and decide the weight to give the witnesses' testimony. In emphasizing Dr. Rollins' credentials and suggesting her testimony and recommendations should have been given greater weight, Rebecca is essentially asking this court to re-weigh the evidence. This we will not do. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207.

¶17 Rebecca also summarily contends ADES failed to provide sufficient evidence to support the juvenile court's finding that termination of her parental rights was in Isabelle's best interests. That finding need only be supported by a preponderance of the evidence. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005). "Evidence that a child will derive 'an affirmative benefit from termination' is sufficient to satisfy that burden, and '[t]he existence of a current adoptive plan is one well-recognized example of such a benefit.'" *Bobby G.*, 540 Ariz. Adv. Rep. 6, ¶ 15, *quoting Ariz. Dep't of Econ. Sec. v. Oscar*

O., 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004) (alteration in *Bobby G.*). And to the extent Rebecca is suggesting otherwise, ADES need not establish that there exists a specific plan for adoption, but "only that the child is adoptable and the existing placement is meeting the child's needs." *Id*.

¶18 Ample evidence supported the juvenile court's finding. As ADES points out, Isabelle had been living in the same foster home since July 2007. She was thriving, her needs were being met, and she is adoptable. Isabelle had been seriously injured while in Rebecca's care, and there was evidence that, despite the services provided to her, Isabelle was safer in the foster home than she would have been if ever returned to Rebecca—as Rebecca herself conceded. That evidence included the testimony of Stoe-Bedoya that Rebecca had benefitted only minimally from the services she had received; that, based on her dependent personality disorder, Stoe-Bedoya believed Rebecca "would get into a volatile situation"; that Rebecca appeared to minimize the incident involving Isabelle and did not seem to accept responsibility for Isabelle's injuries; that Rebecca had told Stoe-Bedoya "she would allow [her boyfriend] to call the shots for her child and it was better for the child to get beaten versus" herself; and that, at her last therapy session, Rebecca had a black eye, claiming she had been assaulted by a woman and never reported it to police.

¶19 Rebecca also argues that the juvenile court erred when it overruled her objection to the testimony of Jordana Saletan, the intake mental health or bonding and attachment specialist. Specifically, she contends the evidence was irrelevant because the

service Saletan provided began over nine months after Isabelle was removed from the home. *See* Ariz. R. Evid. 401, 403. The objection and argument on appeal, however, relate to the termination of Rebecca's rights pursuant to § 8-533(B)(8)(a). In light of our discussion above, the nine-month period had no bearing on the termination of Rebecca's rights pursuant to § 8-533(B)(2). Moreover, without deciding whether the court properly admitted and considered this evidence with respect to § 8-533(B)(8)(a), as we stated above, evidence of the rehabilitative services provided and whether Rebecca had benefitted from them was relevant to the court's determination of Isabelle's best interests. "We will not disturb a trial court's ruling on the admission or exclusion of evidence unless a clear abuse of discretion is present and prejudice resulted therefrom." *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 11, 178 P.3d 511, 514 (App. 2008). We see neither here.

¶20 For the same reason, we summarily reject Rebecca's related argument that the juvenile court should not have considered evidence of Isabelle's abuse or neglect because the proper services purportedly were not provided until nine months after Isabelle was removed from the home. Moreover, we fail to discern how ADES reasonably could have been precluded from presenting evidence that directly related to § 8-533(B)(2), a ground it had alleged in its motion to terminate Rebecca's parental rights.

¶21 Having found the juvenile court's order is sustainable on the ground of abuse or neglect, we need not address Rebecca's arguments that the court erred by terminating her

rights based on the length of time in care. *See Michael J.*, 196 Ariz. 246, ¶ 12, 995 P.2d at 685. We affirm the order terminating Rebecca's parental rights to Isabelle.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge