

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAN P.,)	
)	
Appellant,)	2 CA-JV 2009-0022
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
ANGELA P.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18638000

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

Thea M. Gilbert

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Chief Judge.

¶1 Jan P. appeals from the juvenile court’s order of February 17, 2009, appointing a permanent guardian for Jan’s daughter Angela P., born in June 1994. Jan contends she was denied effective assistance of counsel and claims the juvenile court erred in finding the elements of A.R.S. § 8-871(A)(3) had been proven by clear and convincing evidence. We affirm.

¶2 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 Angela was thirteen years old when Child Protective Services (CPS) removed her from her mother’s legal custody in April 2008. Approximately a year earlier, Jan had enrolled Angela in counseling after Angela disclosed that she had been sexually abused by her father when she was between five and ten years old.¹ The evidence suggested Angela’s relationship with her mother changed significantly after Angela’s disclosure.

¶3 In approximately March 2008, CPS received a report alleging that Jan was emotionally abusing Angela. Investigation revealed that Angela was experiencing symptoms of serious depression and anxiety, and she expressed a clear wish to move out of her mother’s home. According to Angela, Jan threatened, bullied, and verbally harassed her; called her “fat” and “ugly”; and threatened to make Angela live with her father if she were unhappy living with Jan. In addition, Angela had never been enrolled in school. Although Jan

¹Angela’s parents were never married, and Angela has had no contact with her father since approximately 2005.

claimed to have home-schooled Angela and her younger half-sister Shauna, both Angela and Shauna were “markedly behind” their peers academically. Angela was reportedly left at home alone with Shauna much of the time, and her only social outlet was participation in church activities.

¶4 After investigating the report of possible abuse, CPS provided intensive in-home services to the family. In late March 2008, Jan agreed to let Angela stay temporarily with her former stepmother, Valerie S. In a report to the juvenile court dated April 17, 2008, the initial case worker wrote:

Though voluntary services were offered, [Jan]’s extreme need for control created additional anxiety for Angela, such that the team recommended the only contact between Angela and the mother was to be therapeutically facilitated. Both the psychologist who evaluated Angela and the intensive in-home therapist working with the family opined that the family’s issues would likely not be resolved to the extent that Angela could return home within the 60-90 days reserved for voluntary out of home placements.

¶5 In mid-April, therefore, the Arizona Department of Economic Security (ADES) filed a petition alleging Angela was a dependent child. In May, Jan admitted the allegations of an amended dependency petition. Among the allegations she admitted were the following:

The thirteen-year-old child is unwilling to live with the mother and states that she will run away if she is sent back to her. In the mother’s care, the child showed signs of depression including suicidal thoughts, frequent crying, loss of appetite and cutting herself. The child’s therapist as well as the psychologist who performed a psychological evaluation on the child, both recommended that the child remain out of the mother’s home and that the only contact between the mother and child be face-to-face therapeutic contact. . . .

Based on Jan's admissions, the juvenile court adjudicated Angela dependent on May 20, 2008, and approved her continued placement with Valerie.

¶6 In November 2008, ADES filed a motion requesting the juvenile court appoint Valerie as Angela's permanent guardian. Jan did not file a written opposition to the motion but, at a dependency review hearing in December, requested "a guardianship trial." The court scheduled a combined dependency review hearing, permanency hearing, and contested guardianship hearing to begin on January 26, 2009. At the conclusion of the hearing, held over four days between January 26 and February 2, 2009, the court took its ruling under advisement before granting ADES's motion in a detailed minute entry order. The court found the statutory criteria for establishing a permanent guardianship had been proven by clear and convincing evidence and thus ordered Valerie appointed as Angela's permanent guardian.

¶7 Section 8-871 sets forth the criteria for appointing a permanent guardian for a child. It provides, in pertinent part:

A. The court may establish a permanent guardianship between a child and the guardian if the prospective guardianship is in the child's best interests and all of the following apply:

1. The child has been adjudicated a dependent child.
2. The child has been in the custody of the prospective permanent guardian for at least nine months as a dependent child. The court may waive this requirement for good cause.
3. If the child is in the custody of the division or agency, the division or agency has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds that reunification

efforts are not required by law or if reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child.

4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests.

B. The court may consider any adult, including a relative or foster parent, as a permanent guardian. An agency or institution may not be a permanent guardian. The court shall appoint a person nominated by the child if the child is at least twelve years of age, unless the court finds that the appointment would not be in the child's best interests. The court shall consider the child's objection to the appointment of the person nominated as permanent guardian.

C. In proceedings for permanent guardianship, the court shall give primary consideration to the physical, mental and emotional needs of the child.

¶8 The party moving for the appointment of a permanent guardian “has the burden of proof by clear and convincing evidence.” A.R.S. § 8-872(F). On review, we will affirm the juvenile court's order ““unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing.”” *Denise R. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2009-0003, ¶ 7, 2009 WL 1451452 (Ariz. Ct. App. May 26, 2009), quoting *Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955); see also *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997).

¶9 Of the two interrelated issues Jan raises on appeal, we consider first her contention that the juvenile court erred in finding ADES had made reasonable reunification efforts as required by § 8-871(A)(3). Jan contends “reunification is all but impossible” without “meaningful contact between parent and child,” and she complains that the only

contact she was allowed with Angela was at meetings of the Child and Family Team. According to Jan, “No therapeutic services were offered because Angela refused to participate.” Jan argues that ADES failed to adequately involve her individual therapist in the proceedings or permit contact between her therapist and Angela’s. She also suggests “Angela’s therapist was not really addressing the parent-child relationship issues but was focused on supporting Angela in the placement and addressing her sexual abuse” by her father. Further, Jan complains that the case was “expedited” and reunification efforts curtailed by Valerie’s plan to move with Angela to the Philippines in connection with Valerie’s job, in the absence of evidence documenting either the need for or timing of Valerie’s relocation. Finally, Jan also argues no evidence was presented to support the juvenile court’s finding that further reunification efforts would have been unproductive.

¶10 The issue for the juvenile court under § 8-871(A)(3) was whether ADES “ha[d] made reasonable efforts to reunite the parent and child and [whether] further efforts would be unproductive.” The evidence showed that, beginning in March 2008, ADES had provided Jan with intensive in-home services including therapy sessions. Jan subsequently received a psychological evaluation by Dr. Lorraine Rasp Rollins, a substance abuse assessment, individual counseling, and a referral for therapeutic visitation between Jan and Angela. ADES had also attempted to arrange suitable parenting classes for Jan. In addition, ADES had provided Angela with a psychological evaluation and ongoing therapy, including sexual abuse counseling, individual counseling, and “family counseling when therapeutically recommended.” Angela remained steadfastly opposed to attending therapeutic visitations

with her mother, and the psychologist who had performed Angela's psychological evaluation testified that it would not have been profitable to force her to participate in therapeutic sessions with Jan, particularly when Jan had accepted no responsibility for her abusive treatment of Angela. The evidence demonstrates that ADES had provided Jan and Angela with the services that were clearly appropriate.

¶11 We interpret Jan's various assertions on appeal as, in effect, a request that we reweigh and reevaluate the evidence, something this court does not do. That is the province of the juvenile court as the finder of fact. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2005) (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). Having reviewed the record, we are satisfied that it contains more than ample evidence to support the juvenile court's factual findings.

¶12 Although ADES offered appropriate services and although Jan participated in those services, the evidence established that she did not benefit appreciably from her participation. Dr. Rollins testified that Jan exhibited an extremely high level of denial and defensiveness. Not only did Jan's defensiveness and denial interfere with Rollins's ability to make accurate diagnoses, they also prevented Jan from acknowledging any role in her damaged relationship with Angela and therefore kept her from making any therapeutic progress toward repairing the relationship. The juvenile court expressly found that any

further reunification efforts would be unproductive “based on . . . the minor’s refusal to attend any joint counseling with her mother, . . . the mother’s lack of understanding [of] the issues that the minor has with returning to her . . . [and the mother’s] failure to acknowledge the true extent of the emotional abuse she has caused her daughter.” The court’s finding is supported not only by the report and testimony of Dr. Rollins but also by the opinion of the ongoing case manager that any further reunification efforts would be fruitless.

¶13 In a related argument, Jan contends she received ineffective assistance of counsel during the dependency proceeding because her attorney failed to object to the juvenile court’s interim findings that ADES was making reasonable efforts to provide appropriate reunification services while the case was pending. She contends counsel should have objected to the lack of “joint therapy and/or contact between” Jan and Angela and to the fact that Valerie’s proposal to move to the Philippines and to take Angela with her would effectively deny Jan any further opportunity to work toward reunification.

¶14 Although Jan thus identifies various objections she believes counsel should have raised below on her behalf, she has failed to establish either of the two prerequisites for a colorable claim of ineffective assistance of counsel.² She has neither alleged nor shown that counsel’s performance fell below an objective standard of professional competence for counsel in this specific context, nor has she alleged or argued that, had the objections been

²As we have done on other occasions, we assume for present purposes without expressly deciding that a claim of “ineffective assistance of counsel ‘is properly raised in the context of a dependency proceeding.’” *John M. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 320, ¶ 12, 173 P.3d 1021, 1024 (App. 2007), quoting *Santa Cruz County Juv. Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. 98, 101, 804 P.2d 827, 830 (App. 1990).

made, the juvenile court would have reached a different result and not appointed a permanent guardian for Angela. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 8, 173 P.3d 1021, 1022-24 (App. 2007). Our review of the evidence persuades us that the objections Jan claims counsel should have asserted were unlikely to have changed the court's finding that ADES had made reasonable reunification efforts and equally unlikely to have led the court to deny the motion for permanent guardianship. In the absence of any reasonable likelihood—or even an allegation—of actual prejudice, we find no merit to Jan's contention that she was denied the effective assistance of counsel.

¶15 The juvenile court's order appointing Valerie S. as permanent guardian for Angela P. is affirmed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

JOHN PELANDER, Judge