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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RAELENE F., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ANIYA Z.-F., Appellees.	2 CA-JV 2009-0042 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18304100

Honorable Charles S. Sabalos, Judge

REVERSED AND REMANDED

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H O W A R D, Chief Judge.

¶1 Raelene F. appeals the juvenile court's order terminating her parental rights to her daughter, Aniya Z.-F., on the ground that she had been unable to remedy the circumstances that caused Aniya to remain in a court-ordered, out-of-home placement for fifteen months or longer and there was a substantial likelihood she would be unable to parent effectively in the near future. *See* A.R.S. § 8-533(B)(8)(c). Because the Arizona Department of Economic Security (ADES) failed to prove one of these required elements, we reverse.

Background

¶2 We view the evidence and reasonable inferences to be drawn from it in the light most favorable to "supporting the findings of the trial court." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002). Raelene was three months pregnant when she was arrested in Tennessee for the sale of cocaine and was incarcerated when she gave birth to Aniya in February 2007. Rather than place Aniya with social services in Tennessee, Raelene gave her sister, Sheri, a power of attorney to care for the child. Sheri took custody of Aniya when she was four days old. Raelene pleaded guilty to a felony controlled substance charge in April 2007 and remained in prison until she was released on parole in November 2008.[1]

¶3 Although Sheri lived in Missouri, she brought Aniya to Arizona in the spring of 2007 to visit relatives here. Sheri and Aniya had initially stayed with Raelene's adult

[1]The Tennessee court ordered the sentence it had imposed to be served concurrently with the sentence imposed for her 2003 conviction for possession of a controlled substance with intent to sell, which Raelene had been serving through a community-based alternative to prison.

daughter, Ayla, but after Sheri and Ayla had a falling out, Sheri and Aniya moved into a shelter. On June 20, 2007, Child Protective Services (CPS) received a report that Sheri had been "rough" when handling Aniya and was unable to care for her because of her own mental illness. Through its investigation, CPS learned Sheri had taken Aniya to see numerous doctors, reporting the baby suffered from a variety of symptoms that could not be verified by medical staff. As a result, Aniya had been subjected to allegedly unnecessary medical tests, some of them invasive. In addition, Sheri admitted her parental rights to her own four children had been terminated in Arizona fifteen to twenty years earlier.

¶4 CPS took Aniya into protective custody and placed her in foster care. In September 2007, Raelene admitted the allegations in an amended dependency petition, including the allegation that she was unable to care for Aniya due to her incarceration. Raelene acknowledged ADES's concerns about Sheri's ability to be Aniya's custodian. But the amended petition also included Raelene's statement that she had not known of any reasons Sheri would be an inappropriate caregiver when she placed Aniya with her. After finding Aniya was a dependent child, the juvenile court approved a case plan goal of reunification.

¶5 CPS Investigator Bill Villanti had asked Raelene to identify family members or close friends who could serve as a placement for Aniya, either in Arizona or Tennessee. He had explained any potential placement in Tennessee would need to be investigated and approved by Tennessee authorities, in compliance with the Interstate Compact on the Placement of Children (ICPC). *See* A.R.S. §§ 8-548 through 8-548.06. Raelene suggested two acquaintances in Tennessee as possible placements, and CPS requested ICPC home

study investigations for each of them. However, these applications for approval as ICPC foster care placements were ultimately rejected.[2] CPS was also unable to find any relative who was appropriate to serve as a kinship placement for Aniya, and she remained in foster care in Arizona.[3]

¶6 In various progress reports to the juvenile court, CPS case manager Suzanne Millet had reported Raelene's expected release date was October 2008 and that, "due to the mother's lengthy incarceration, services have been hard to provide." But, she stated, Raelene was involved in "an intensive transition program" through the Tennessee prison system that included parenting and substance abuse classes, counseling, and job skill training.

¶7 At dependency review hearings in January and April 2008, the juvenile court found Raelene was not in compliance with the case plan services offered by CPS "but has been participating in substance abuse classes, parenting classes and job skills classes which are available to [her] in the correctional facility in which she has been residing." The court found the plan of reunification continued to be appropriate, stating,

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[2]One of the acquaintances Raelene had suggested had failed to complete a thirty-hour class required of foster parents in Tennessee and was rejected as an ICPC placement candidate. The other was approved to adopt Aniya, but her application to provide foster placement was rejected because of the number of children already in her care.

[3]During the course of the dependency proceeding, CPS had placed Aniya in three different foster homes. She had been removed from her first foster home in August 2007 after children previously placed there had complained of abuse. She was moved again in February 2008 from foster care to a foster-to-adopt placement with a couple who were willing to consider her adoption.

> The Court finds . . . that the Arizona Department of Economic Security has made reasonable efforts to promote the plan of reunification by offering a full range of reunification services outlined in the case plan which are presently unavailable to the mother due to her current incarceration in the State of Tennessee.

The court continued the June 30, 2008 permanency hearing and approved a concurrent plan of family reunification and severance and adoption after finding Raelene was "not in compliance with the case plan." But the court also found her "failure to comply with the offered case plan is due, primarily, to her [out-of-state] incarceration." The court acknowledged Raelene's "efforts in the prison system in the State of Tennessee to participate in remedial and rehabilitative services that are comparable to those that would be offered by [ADES]."

¶8 Raelene was released from prison in November and was assigned to live in a halfway house through February 2009. When the permanency hearing resumed in December 2008, Raelene informed the juvenile court she had identified a third potential placement in Tennessee and asked that the hearing be continued so that an ICPC home study for this third possible placement could be conducted. ADES argued a new ICPC home study request would delay permanency for Aniya, whose foster parents were willing to adopt her, and the court denied Raelene's request for the study. The court found ADES had made reasonable efforts to achieve the goal of family reunification through the services identified in Millet's permanency hearing report but that, "despite the offering of reunification services, the mother is only in partial compliance with the case plan, predominantly due to her incarceration and through the provision of services that were available to her in the prison system." The court

approved a permanency goal of severance and adoption and directed ADES to file a motion to terminate Raelene's parental rights.

¶9 In the motion ADES subsequently filed, it alleged Aniya had been in court-ordered, out-of-home care for fifteen months or longer and that, despite services offered by the Tennessee Department of Corrections, Raelene had failed to remedy the circumstances that caused Aniya to remain out of the home and there was a substantial likelihood she would not be capable of exercising proper and effective parental care and control in the near future. *See* § 8-533(B)(8)(c). Specifically, ADES alleged: (1) Raelene had been "incarcerated in Tennessee prior to [Aniya]'s birth until October 2008," (2) she remained "in Tennessee on parole," and (3) "[h]er ability to safely parent and provide for her child remains unknown."

¶10 After a two-day hearing in March 2009, the juvenile court found ADES had proven the alleged ground for termination and severed Raelene's parental rights to Aniya. Addressing the efforts ADES had made to provide appropriate reunification services, the court reasoned, "[Raelene] has no relationship with this child as a result of choices she has made." Those choices included her decision to commit a crime while pregnant and her decision to entrust Aniya's care to Sheri, who later brought Aniya to Arizona, instead of granting custody to the Tennessee Department of Children's Services.[4] The court continued,

> This irresponsible act, in and of itself, demonstrates [Raelene's] inability to exercise proper and effective parental care and control. [Her] confinement and parole status in the state of Tennessee has made it virtually impossible for the ADES to

[4]The juvenile court found, "[Raelene's] claim that she did not know about her sister's mental health condition and the loss of her parental rights in her own four children is not credible . . . ."

> provide court-ordered reunification services and to monitor [her] progress with the case plan. Under circumstances largely created by the mother, CPS' efforts to provide appropriate reunification services have been rendered futile. The mother has caused and failed to remedy the circumstances that cause this child to be dependent, in an out-of-home placement and to have had no opportunity for legal permanency within the statutory time limits. Giving the mother an extended period of time to prove her sobriety and to begin the process of bonding with this child is an unreasonable and unacceptable alternative to termination and adoption.

Discussion

¶11 On appeal, Raelene contends ADES failed to establish the time-in-care ground by clear and convincing evidence. Specifically, she argues ADES failed to make a diligent effort to place Aniya in Tennessee, where Raelene was incarcerated, and thereby deprived Raelene of an opportunity "to participate in meaningful programs to assist with the reunification process." Raelene also argues she "was prepared to parent immediately at the time of the severance trial but for the fact she was in Tennessee and the child was in Arizona"[5] and challenges the court's finding that termination of her rights was in Aniya's best interests.

¶12 On review of a termination order, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. We

[5]We acknowledge that Raelene's argument on this issue is not well developed and do not fault ADES for failing to respond to it in the answering brief. Nevertheless, we are hesitant to find an argument has been waived or abandoned in the context of fundamental rights. *Cf. Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (applying fundamental error doctrine in severance case).

review de novo any issues of law, including a juvenile court's interpretation of statutes. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, ¶ 13, 178 P.3d 511, 515 (App. 2008).

¶13 We first examine whether substantial evidence supports the trial court's finding there is a substantial likelihood Raelene will be unable to exercise effective parental care and control in the near future. Section 8-533(B)(8)(c) requires that the state prove by clear and convincing evidence that

> [t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order[,] . . . the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and 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.

See also A.R.S. § 8-863(B) (requiring clear and convincing evidence). As we found in interpreting a predecessor statute interpreting the term "parental responsibilities," "parental care and control" is not "intended to encompass any exclusive set of factors but rather to establish a standard which permits a trial judge flexibility in considering the unique circumstances of each termination case before determining the parent's ability to discharge his or her parental responsibilities." *In re Maricopa County Juv. Action No. JS-5894*, 145 Ariz. 405, 409, 701 P.2d 1213, 1217 (App. 1985).[6]

¶14 As an initial matter, we question the sufficiency of the allegations in ADES's motion for termination. Using the language found in § 8-533(B)(8)(c), ADES alleged Raelene had failed to remedy the circumstances causing Aniya's out-of-home placement and

[6]For purposes of this appeal, we need not determine whether "parental care and control" is narrower than "parental responsibilities."

there was a substantial likelihood she would be unable to parent effectively in the near future. But, somewhat incongruously, as factual support for these allegations, ADES alleged only that Raelene remained in Tennessee on parole and that "[h]er ability to safely parent and provide for her child remains unknown."

¶15 Additionally, at the termination hearing, ADES argued it had established there was a substantial likelihood reunification could not be accomplished in the near future because "[w]e know that Raelene can't come here and we know that the baby can't get there, not in the near future." ADES had maintained, "the near future is not in a year . . . [or] ten months," apparently relying on testimony that, once requested, an ICPC home study for Raelene could take as long as six months to process and likely would not be requested by CPS until after Raelene had demonstrated several more months of stability. Although these factors may have established Raelene failed to remedy the circumstances that prevented reunification, the statute also requires clear and convincing evidence that there is a substantial likelihood the parent "will not be capable of exercising proper and effective parental care and control in the near future." § 8-533(B)(8)(c).

¶16 The evidence ADES relies on to support the juvenile court's order pertains not to Raelene's capability of exercising proper and effective parental care and control but impediments to reunification that were imposed by the state.[7] Although these impediments

[7]For example, nothing in the juvenile court's order suggests it agreed with ADES that ICPC processing time be considered in determining whether there was a substantial likelihood Raelene would be unable to parent in the near future. We seriously doubt the legislature intended courts to view such placement barriers as indicative of a parent's inability to parent effectively.

may be relevant when they are more closely tied to the parent's inabilities, rather than unknown concerns and fears, here ADES neither properly alleged in its motion nor established with clear and convincing evidence that Raelene lacked the ability to properly parent her children or that she would be incapable of doing so in the near future, even if these impediments were removed. *See Jordan C. v. Ariz. Dep't Econ. Sec.*, Nos. 2 CA-JV 2009-0019, 2 CA-JV 2009-0020 (Consolidated), ¶¶ 31-32, 2009 WL 3740849 (Ariz. Ct. App. Nov. 10, 2009).

¶17 ADES presented no evidence that Raelene presently lacked parenting skills. The juvenile court acknowledged Raelene had participated in services "comparable to those that would be offered by [ADES]" in Arizona. Evidence of Raelene's participation and performance in those programs was uniformly positive. During cross-examination, two of the CPS employees testified they knew of no physical or mental impairment that would render Raelene unable to parent a child. During closing argument, ADES told the court it was "concerned [because] . . . we don't know. There are a lot of ifs. There are a lot of unknowns. We don't know whether the mother can live and be stable independently on her own. We don't know whether she's going to be able to keep this job."

¶18 ADES also maintained at the termination hearing that Raelene's 2007 conviction and her decision to place Aniya in Sheri's care established her inability to parent. It argued her 2007 offense "suggests that this mother has not let go entirely of her connection to what is not only a criminal element, but an unsafe situation for a young child." But both of those events preceded the dependency, before Raelene had the opportunity to benefit, and apparently did benefit, from services designed to improve her parenting abilities. ADES

presented no evidence to contradict Raelene's testimony that she had been drug free for approximately five years, or the testimony of others that she had not tested positive for drug use during her incarceration, while on release for community service or work release, or while on parole. ADES had not conducted a psychological evaluation of Raelene, and the CPS case managers had virtually no direct contact with her.[8] As a result, ADES offered no qualified opinion evidence that Raelene was presently unstable or likely to relapse into drug abuse, lose her housing, or lose her employment.

¶19 Nonetheless, ADES argued "there is not clear evidence while the mother has been out of prison and on her own that she has absolutely divorced herself from that kind of a lifestyle" or of a "substantial likelihood" she would "be able to exercise proper and effective parental care and control in the near future." But it was not Raelene's burden to prove she was a fit parent; it was ADES's burden to prove she was not. Similarly, Raelene was not required to establish she is presently able to parent or that there is a substantial likelihood she will be able to do so in the near future. Rather, ADES was required to show by clear and convincing evidence she cannot parent now and there is a substantial likelihood she would be unable to do so in the near future. Thus, ADES's argument improperly shifted

[8]Millet testified ADES could have arranged a psychological evaluation of Raelene in Tennessee after her release from prison but seemed to suggest this and other services were not arranged for Raelene because ADES did not know whether the conditions of Raelene's parole would ultimately permit her relocation to Arizona. Larissa Hutchings, a psychiatric social worker for the Tennessee Board of Probation and Parole, had performed a "Brief Assessment" of Raelene's psychological condition, but ADES did not seek to admit Hutchings's report at the termination hearing.

the burden to Raelene to disprove the sole ground it had alleged in its motion for terminating her parental rights.

¶20 Although we will affirm a termination order that is based on reasonable evidence, on this record, we are constrained to conclude the absence of knowledge about Raelene's parenting ability is insufficient, as a matter of law, to establish that there is "a substantial likelihood that [Raelene] will not be capable of exercising proper and effective parental care and control in the near future." § 8-533(B)(8)(c). We agree with the juvenile court's retroactive assessment of Raelene's choices but find a lack of evidence showing a prospective incapability to parent.

¶21 Based on our conclusion, we need not address Raelene's alternative arguments that the court erred in finding ADES had made a diligent effort to reunify her with Aniya and that termination of her parental rights was in Aniya's best interests. But because some of the same legal issues raised by the parties here will be relevant on remand, we address them briefly.

¶22 In particular, we are troubled by some of the representations by CPS case managers and arguments by ADES's counsel about construction of the ICPC that are inconsistent with or unsupported by its express provisions. For example, Millet testified a sending agency, such as ADES, is able to place a child out of state in compliance with the ICPC only by requesting a home study for "an identified suitable placement" with "someone [who] has a relationship with the child" in the receiving state. But the ICPC does not require a preexisting relationship for placement and clearly provides that a sending agency may place dependent children in another state either by submitting a proposed "person, agency or

institution" for approval by the receiving state, § 8-548(III)(b)(3), or by "enter[ing] into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services" as ADES's agent, § 8-548(V)(b).[9] We also see no basis in the law for CPS case manager Cynthia Ramirez's agreement with counsel for ADES that the ICPC required Raelene to "have her own permanent residence" before she could be considered for ICPC placement.

¶23 Similarly, we are concerned that, throughout the course of this dependency, neither party addressed ADES's obligation, pursuant to federal statute, to provide Aniya with "a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available *and in close proximity to the parents' home*, consistent with the best interest and special needs of the child . . . ." 42 U.S.C.A. § 675(5)(A) (emphasis added); *see also* P.L. 96-272, § 475 (promulgating 42 U.S.C.A. § 675); *Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 5, 1 P.3d 155, 157 (App. 2000) (noting legislature's intent that ADES comply with federal requirements "in order to be eligible for federal child welfare funding"). As a result, the juvenile court does not appear to have considered this objective in rendering its decision.

[9]We do not address Raelene's similar argument, raised for the first time on appeal, that the ICPC does not require a sending agency to identify a specific proposed placement in a request for ICPC approval.

Conclusion

¶24 For the foregoing reasons, we reverse the juvenile court's order terminating Raelene's parental rights to Aniya and remand the case to the juvenile court for further proceedings.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

GARYE A. VÁSQUEZ, Judge