IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MEGAN R., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and LIANNA M., Appellees.	2 CA-JV 2009-0056 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18001300

Honorable Karen S. Adam, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo — Tucson
Attorneys for Appellee Arizona Department of Economic Security

---

E S P I N O S A, Presiding Judge.

¶1 Megan R. appeals the juvenile court's May 22, 2009 order terminating her parental rights to her daughter, Lianna M., on the grounds of neglect or abuse, *see* A.R.S. § 8-533(B)(2), and length of time in care, § 8-533(B)(8)(c) (fifteen months or longer). Megan asserts there was insufficient evidence to support the court's order and also maintains the court and ADES violated her substantive due process rights. For the reasons stated below, we affirm.

¶2 We view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining an order terminating parental rights. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002). So viewed, the evidence established that in late September 2006, when Lianna was twenty-two months old, Megan left her with one of her regular caretakers who found Lianna to have bruises, abrasions, and lacerations on her face, trunk, and limbs, as well as missing patches of hair from her scalp. The Tucson Police Department (TPD) and Child Protective Services (CPS) were notified and investigated Lianna's injuries.

¶3 Megan told a CPS investigator she had seen the injuries days earlier but had not thought they were serious and had not taken Lianna to see a doctor. She explained she had been at work, leaving her boyfriend, Michael P., to care for Lianna on the day the injuries occurred. Megan had insisted Lianna's injuries had been accidental, contending Michael had placed Lianna in "time out" in a bedroom, where she "had a field day" and

might have sustained the injuries by tripping over some laundry or a shoe.[1] She further stated Lianna bruised easily, was "clumsy" and "anemic," and "pulls her own hair out." When Michael was questioned by CPS and TPD investigators, he denied Lianna had been injured at all while in his care. Both Megan and Michael admitted regularly using marijuana at least three times a week.

¶4 After CPS completed its investigation, the Arizona Department of Economic Security (ADES) removed Lianna from Megan's custody, placed her with paternal relatives, and filed a dependency petition. Megan later admitted the allegations in an amended dependency petition, and the juvenile court adjudicated Lianna dependent and approved a case plan goal of reunification.[2]

¶5 CPS prepared a case plan with tasks designed to assist Megan in accomplishing that goal, including participation in a psychological evaluation; a substance abuse assessment and treatment program; random urinalysis testing with results free of alcohol, illegal drugs, and prescription drugs not currently prescribed; and parenting classes. The case plan also required Megan to resolve any outstanding legal issues.

¶6 Throughout October and November 2006, Megan frequently tested positive for marijuana and, on one occasion, for alcohol. When psychologist Dee Winsky evaluated

---

[1]Despite her suggestion that all of Lianna's injuries had occurred during this single "time out," Megan had admitted the allegation in the dependency petition that the injuries appeared to be in different stages of healing.

[2]Lianna's father, Timothy M., was incarcerated at the time and has since relinquished his parental rights. He is not a party to this appeal.

Megan in February 2007, Megan reported she had begun using alcohol when she was in the fourth grade and her parents had once found her passed out on the floor. She said she began drinking wine regularly in the eighth grade, started smoking marijuana when she was fourteen, and had continued her frequent marijuana use into young adulthood, while also experimenting with ecstasy and cocaine. At age twenty-two, Megan told Winsky her continued marijuana use was "no problem" and had "never interfered with her life [until she] had a child." She also told Winsky she was still seeing Michael, despite her understanding that it could jeopardize her opportunity for reunification. She continued to insist Lianna's injuries had been accidental, stating, "I believe everything [Michael] said, it's really not that serious."

¶7 Winsky diagnosed Megan with "cannabis dependence" and opined that her "[parenting] weakness clearly lies in her lack of vigilance and oversight in ensuring that her daughter is always adequately supervised and safe." Winsky also noted Megan's "demonstrated lack of knowledge regarding child development," adding, "Her substance abuse has probably been contributory to these issues."[3]

¶8 During the next eight months, Megan generally complied with random urinalysis but occasionally failed to call in daily as required or missed scheduled tests. She also completed a course of individual therapy, substance abuse group sessions, and parenting classes. At an October 2007 permanency hearing, the juvenile court found Lianna could not

[3] After Lianna was removed from Megan's custody, she was found to have speech and other developmental delays, requiring speech and physical therapy.

yet safely be returned to Megan's custody because Megan had "not yet dealt with . . . the issue of her relationship with the perpetrator and her ability therefore to protect [Lianna] in the future." At ADES's request, the court then continued the hearing to afford Megan three more months to work toward reunification, and ADES agreed to provide Megan with additional counseling services.

¶9 A week after the permanency hearing, on October 9, 2007, Megan was arrested for driving under the influence of intoxicating liquor (DUI), an offense for which she was later convicted and placed on probation. When CPS case manager Melissa Duncan confronted Megan about the arrest, Megan admitted she had gone drinking with a friend after her "healthy relationships" class. Later that month, Megan again failed to call in as scheduled for random urinalysis. In November, Megan began individual therapy with Dr. Elizabeth Wong to address the recent DUI, the events that had caused Lianna's out-of-home placement, and her ability to exercise good judgment about her relationships so that she could protect herself and her daughter.

¶10 By December 2007, Duncan expressed reservations about whether a case plan goal of reunification was realistic and whether Megan would be able to meet Lianna's needs if the child were returned to her. At the conclusion of the January 7, 2008 continued permanency hearing, the juvenile court ordered ADES to file either a motion for termination or a motion for the appointment of a permanent guardian. The court also ordered ADES to continue providing reunification services for Megan and urged Megan "to take advantage" of available services, including "[Twelve] Step Meetings or Smart Recovery."

¶11 In accordance with the juvenile court's order, ADES moved to terminate Megan's parental rights on the grounds that she had neglected or abused Lianna, *see* § 8-533(B)(2), and had failed to remedy the circumstances causing Lianna's out-of-home placement to continue beyond fifteen months, *see* § 8-533(B)(8)(c).[4] But ADES later withdrew its allegations of abuse or neglect and told the court at the close of the June 2008 termination hearing that it did not believe it had proven there was a substantial likelihood Megan would be unable to parent in the near future, as required to establish the fifteen-month-in-care ground under § 8-533(B)(8)(c). The state cited Wong's testimony about the progress Megan had made and her opinion that a child placed in Megan's care would not be at risk, even though she believed Megan still required another nine months to a year of therapy to fully address issues related to problem-solving, safety, healthy relationships, and drinking and driving. The court denied the state's motion for termination, not for the reason argued by ADES but based on its finding that ADES had failed to make a diligent effort to provide appropriate reunification services. Specifically, the court found ADES had failed to provide services designed to address Megan's history of alcohol abuse.[5]

¶12 Over the next nine months, Megan missed numerous sessions with Wong and was not consistent in engaging in therapy. Despite the juvenile court's urging that she attend

---

[4]Section 8-533(B)(8) was recently amended, and former § 8-533(B)(8)(b) is now renumbered as § 8-533(B)(8)(c). 2008 Ariz. Sess. Laws, ch. 198, § 2. We refer in this decision to the current statutory provision.

[5]In addition to Megan's arrest and conviction for DUI, the juvenile court noted evidence that Megan had tested positive for alcohol just two weeks before the June 2008 termination hearing.

a twelve-step program, and an amendment to her case plan requiring her to attend Alcoholics Anonymous (AA) meetings, her attendance at AA was, at best, sporadic. She failed to comply fully with random urinalysis requirements during July, August, and September. And, although the terms of her probation for her DUI conviction, imposed in the spring of 2008, had included her participation in substance abuse classes and installation of an ignition control device in her vehicle, she had still not completed these requirements by December. In addition, Megan had lost her job in December, after her employer's company credit card had disappeared from her apartment and later showed $9,000 in unauthorized charges.[6] Megan believed the card had been stolen by a homeless acquaintance whom she had allowed to use her home.

¶13 At a dependency review hearing in December 2008, ADES asked the juvenile court to change the case plan goal to severance and adoption, and the court agreed. ADES then filed a second motion to terminate Megan's parental rights alleging, as it had before, grounds of abuse or neglect and length of time in care.

¶14 At the April 2009 termination hearing, Wong again testified that, based on her therapeutic work with Megan, she did not believe a child would be at risk for abuse or neglect if placed in Megan's care.[7] But she cautioned her information was limited because she had never seen Megan interact with Lianna. She also opined that Megan's judgment and

---

[6]Megan remained unemployed and financially dependent on her parents at the time of the April 2009 termination hearing.

[7]Pursuant to a stipulation between the parties, the juvenile court considered the evidence presented at both termination hearings as relevant to its decision on the motion.

decision-making abilities were about the same as they had been in June 2008, despite an additional ten months of therapy. The juvenile court found ADES had proven both of the grounds alleged by clear and convincing evidence and had proven, by a preponderance of the evidence, that termination of Megan's parental rights was in Lianna's best interests.

¶15 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. That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶16 Megan contends "[t]here was no evidence presented whatsoever" that she had failed to remedy the circumstances that cause Lianna to remain in an out-of-home placement or that there was a substantial likelihood Megan would not be capable of parenting effectively in the near future. Both of these elements must be proven to warrant termination pursuant to § 8-533(B)(8)(c). But, as ADES argues, her assertion is belied by Wong's testimony during the two hearings. In June 2008, Wong had testified Megan would require nine months to a year of additional therapy to resolve issues that could affect her parenting skills. However, in April 2009, ten months later, Wong reported Megan had missed "roughly a dozen" appointments, had made little progress in critical areas of judgment and decision-making, and had failed to engage fully in the therapeutic process. Although Megan cites

evidence of her compliance with some aspects of her case plan and testimony about her overall progress in therapy in arguing the evidence was insufficient for termination, it is not the role of this court to reweigh the evidence. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005). We find the evidence was more than sufficient to support the court's findings and its conclusion that termination was warranted pursuant to § 8-533(B)(8)(c).[8]

¶17 We also find the evidence was sufficient to support the juvenile court's determination by a preponderance of the evidence that termination was in Lianna's best interests. As the court stated in its termination order, Lianna had "been in the same loving, adoptive relative placement" for two and a half years, since the commencement of the dependency. Although Megan is correct that "determination that the child is adoptable alone does not require the fact finder to conclude that severance is in the child[]'s best interests," such evidence is sufficient to support a best interests finding. *See In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990); *see also James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998).

¶18 In a somewhat novel argument, Megan also contends the juvenile court violated her right to substantive due process in concluding after the 2008 termination hearing

---

[8]Because we find ample evidence to sustain the court's ruling based on § 8-533(B)(8)(c), we need not address Megan's argument that insufficient evidence supported termination pursuant to § 8-533(B)(2). *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205 ("If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.").

that ADES was required to provide her with services more specifically directed to her abuse of alcohol. In addition, she maintains ADES then also violated her substantive due process rights by failing to comply with the court's order and to provide such specific services. ADES maintains Megan has waived these claims by failing to raise them at the termination adjudication hearing. We are not persuaded by Megan's reply that a substantive due process claim is not subject to waiver. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n.23 (1989) (declining to consider whether punitive damages award violated substantive due process when claim not previously raised); *cf. Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299, 301 (9th Cir. 1996) (federal court had no jurisdiction over substantive due process claim when party failed to adequately raise it below). But, in any event, we conclude the argument is without merit.

¶19 According to Megan, because Winsky's psychological evaluation had specifically diagnosed Megan with cannabis dependence, but not alcohol abuse, the juvenile court had "substituted its own opinions in lieu of the evidence presented at trial." But Winsky's report, prepared early in the dependency and before Megan's arrest for DUI, expressly detailed Megan's long history of alcohol abuse, beginning in her childhood, and spoke of her substance abuse—in general terms—as contributing to her weakness as a parent. Moreover, evidence presented at the termination hearing in 2009 established ADES had provided services directed to assist Megan with her abuse of alcohol, both before her DUI arrest and after. ADES had not only required Megan to attend AA as part of her case plan but, as Wong testified at the 2009 hearing, had also required her to comply with terms of her

probation, which included her participation in an assessment and recommended classes or treatment for alcohol abuse. Megan's failure to fully utilize these services cannot be blamed on ADES. *See In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994) ("[A]DES is not required to provide every conceivable service or to ensure that a parent participates in each service it offers."). We see nothing in the actions of the court or ADES that "shocks the conscience" and thereby constitutes a violation of Megan's right to substantive due process.[9] *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 46, 81 P.3d 1016, 1028 (App. 2003) ("In order to show a substantive due process violation, the abuse of governmental power must be one that 'shocks the conscience.'").

¶20 The juvenile court's termination order is affirmed.

_____
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Chief Judge

_____
GARYE L. VÁSQUEZ, Judge

[9]In her reply brief, Megan asserts ADES also violated her substantive due process rights when her visitation schedule was changed from three times per week to once per week, allegedly due to ADES budget cuts. Megan has waived this argument by failing to raise it in her opening brief. *See Dawson v. Withycombe*, 216 Ariz. 84, n.11, 163 P.3d 1034, 1050 n.11 (App. 2007). Accordingly, we do not address it. *See id.* ¶ 91.