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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TINA P.,) No. 1 CA-JV 11-0042
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, ASHLYNN F. and ANAKIN) ARCAP 28)
F.,)
)
Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. JD 17819

The Honorable Dawn M. Bergin, Judge

AFFIRMED

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By John L. Popilek
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Scottsdale

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Phoenix

H A L L, Judge

¶1 Tina P. (Mother) appeals the juvenile court's order terminating her parental rights to her two children.¹ For the following reasons, we affirm.

FACTUAL² AND PROCEDURAL BACKGROUND

¶2 Mother is the biological parent of A.S.F. and A.J.F. (collectively, the children), born August 2001 and September 2007, respectively. In February 2009, Child Protective Services (CPS) received a report that

[M]other was having a mental breakdown. Mother was yelling at herself and others and stating that she wanted to kill herself or someone else. There [were] concerns that while Mother was having this breakdown, . . . no one was caring for the children. [A.S.F.] was caring for [A.J.F.] and it appear[ed] that she care[d] for [A.J.F.] consistently. The home was cluttered with trash and dirty clothing. Due to the increasing domestic violence in which the children [were] witness to as well as mother's increasing erratic behaviors, the children were taken into custody.³

¶3 On March 3, 2009, Mother's "behavior became out of control" during a CPS meeting. Mother threatened one counselor and attempted to throw a basket at another counselor. She then

¹ The parental rights of the children's father, Joseph F., have also been terminated, but he is not a party to this appeal.

² We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

³ CPS had received multiple reports prior to removing the children from the home of "neglect, an unfit home, increasing domestic violence, including in front of the children, and erratic behaviors by [M]other."

"attacked [] her sister, by pulling her hair and dragging her to the floor. She then began yelling and screaming." Mother's brother attempted to restrain her and while he was doing so, "her pants fell down [and Mother] started to yell, 'Help, he's raping me!'" The police were called for assistance and Mother "threatened to cut the [CPS specialist's] head off and rip her face off" in front of the police. Thereafter, the Arizona Department of Economic Security (ADES) filed a dependency petition, alleging that Mother was unable to parent due to mental-health issues and domestic violence. The juvenile court granted ADES's dependency petition, made the children wards of the court, committed them to the care, custody, and control of ADES, and changed physical custody of the children to their paternal aunt.

¶4 Mother has a long history of mental illness and has been diagnosed with several differing disorders, such as schizoaffective disorder, bipolar disorder, adjustment disorder, borderline personality disorder, post traumatic stress disorder, and major depression. Kathryn Menendez, Ph.D., conducted a psychological examination of Mother in April 2009 and concluded that Mother "presented as confused and contradicted herself and provided irrational responses to the examination." Dr. Menendez also found that Mother "does not appear to have the emotional resources by which to compensate and create a healthy,

functional lifestyle for her children" and has "personality factors that would indirectly cause physical, sexual or emotional abuse of a child." She diagnosed Mother with "R/O Prescriptive Drug Abuse, R/O Bipolar Disorder, [Not otherwise specified], Personality Disorder, [Not otherwise specified], with Passive/Aggressive Traits."

¶15 In June or July 2009, Mother was hospitalized for one month at a mental-health facility "due to violent outbursts, non-compliance with psychiatric treatment and threats of hurting herself and others." From September 2009 to April 2010, Mother received housing, medication monitoring, and counseling from a behavioral health agency. Mother was evicted from the agency after she threatened to "shoot her brains out" if a specific male staff member did not speak with her. The agency ultimately obtained a restraining order against Mother because she continued to stalk and threaten the same staff member.

¶16 Mother attempted to commit suicide several times, including cutting her wrists so deep she required multiple staples in February 2010. Additionally, in May 2010, she overdosed on methamphetamines and was placed on life support for five days, where she tested positive for marijuana, amphetamines and opiates. Mother "head-butted a nurse and had to be placed in restraints" during the May 2010 hospitalization.

¶17 Mother began counseling at Phoenix Interfaith in May 2010 and has sporadically participated in dialectical behavioral therapy for borderline personality disorder.

¶18 Mother was arrested and incarcerated for shoplifting, aggravated assault, and resisting arrest in September 2010. "She assaulted the police officer, kicked the doors and windows of the police car, banged her head against the window and stripped some of her clothing off." She pled no contest to attempted aggravated assault and shoplifting, was sentenced to three years of probation, and released from jail in December 2010.

¶19 To facilitate family reunification, ADES offered Mother parent aide services, a psychological evaluation, medications, medication monitoring, counseling, transportation, and visitations with the children. Mother was only partially compliant with services and "continuously cancelled" counseling appointments. She also failed to: regularly maintain contact with CPS, participate in individual counseling and domestic violence counseling, comply with mental-health services, and cooperate with the parent aide.

¶10 A parent aide informed CPS that Mother was "inappropriate with the children during visits. She would cry, speak in a loud voice, interrogate them and make alarming statements about their health. The children displayed fear of

her." As a result, CPS specialist Elishah Montijo consulted with Dr. Menendez in October 2010, who concluded that Mother "continues to maintain hostile, irrational, and threatening contact with [Montijo and] the child[ren's] safety cannot be guaranteed. It is believed that contact would be harmful to the child[ren] based on [Mother's] past and current behavior. Visits are not appropriate at this time."

¶11 The Foster Care Review Board (FCRB) determined that the children's out-of-home placement was "necessary" and "safe, appropriate and least restrictive." The FCRB noted it was "pleased" the case was progressing towards permanency for the children in the form of severance and adoption.

¶12 In May 2010, ADES moved for termination of the parent-child relationship between Mother and the children. The motion was based on Mother's inability to discharge her parental responsibilities because of mental illness, and the children being in an out-of-home placement for nine months or longer and fifteen months or longer. The court changed the case plan to severance and adoption.

¶13 The juvenile court conducted a contested severance hearing in January 2011. Mother testified that she was not financially able to provide for the children. She stated that she had originally been misdiagnosed with schizoaffective disorder. According to Mother, she was diagnosed with

borderline personality disorder in September 2010 and her medications and therapy changed to reflect the new diagnosis.⁴ She said that the new regime of therapy and medications have helped her immensely and she was voluntarily residing in an 18-hour residential treatment facility.

¶14 CPS specialist Montijo testified that the children were "doing very well" in their placement and she believed severance and adoption was in the children's best interests. She elaborated that "[t]he children have been in care almost two years. They do need stability and permanency. The children were not in a -- a healthy, safe environment before with [Mother], and they just need the stability now." Montijo stated that the children were adoptable and their paternal aunt was willing to adopt them. Finally, Montijo testified that she did not believe that Mother could adequately parent the children at that time.

¶15 The juvenile court found two grounds existed for terminating Mother's rights to the children. First, the court ruled that Mother was "unable to discharge [her] parental responsibilities because of mental illness" and "there [were] reasonable grounds to believe that the condition will continue

⁴ This statement is inaccurate because Mother received this diagnosis in May 2010 and began the new therapy at that time.

for a prolonged indeterminate period of time." Ariz. Rev. Stat. (A.R.S.) § 8-533(B)(3) (2007). The court stated that:

Mother's severe mental illness is long-standing and well documented. The behaviors caused by the mental illness present serious risks to her children and others. Unfortunately, mother has not always been compliant with her court-ordered treatment, and it appears to this Court that her mental health professionals have yet to find a successful medication regimen for her. Although [M]other believes she now has an accurate diagnosis and appropriate medications, she continues to reside at a facility with 18-hour per day on-site staff and she has only just restarted counseling. Given [M]other's long history of mental illness, her significant diagnoses, the high level of required care and the fact that her illness has not abated or improved, there are reasonable grounds her condition will continue for a prolonged indeterminate period of time.

¶16 Second, the court found that the children had been in an out-of-home placement for fifteen months or longer, Mother was unable to remedy the circumstances that caused them to be in an out-of-home placement, and there was a substantial likelihood that Mother would not be capable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c). The court added that Mother's "mental illness preclude[d] her from being able to care for her children. In addition, [M]other [could not] financially support the children and she ha[d] no housing available for them. The Court [saw] no prospect for [M]other being able to change those circumstances in the near future."

¶17 The court found that the children were adoptable. They had been living with their aunt for twenty months and she wanted to adopt them. The children "made tremendous progress with [their aunt] and [we]re very bonded to her." The court stated that although Mother "truly love[d] her children, . . . [the children] need[ed] permanency and stability, and unfortunately, [M]other [was] unable to provide either." The court concluded that it was in the children's best interest to terminate the parent-child relationship with Mother and severed Mother's parental rights to the children.⁵

¶18 Mother timely appealed and argued the juvenile court erred by: (1) failing to differentiate Mother's mental-health prognosis based upon her change in diagnosis, treatment, and medication; (2) concluding that Mother's voluntary decision to reside in the Toby House was evidence of her mental unfitness; (3) failing to continue the matter for at least a brief period of time to determine the effectiveness of Mother's new treatment; (4) terminating Mother's rights under A.R.S. § 8-533(B)(8)(c). Mother also argues she was denied effective assistance of counsel.

⁵ Mother does not challenge the juvenile court's best interest finding and we will therefore not address it on appeal.

¶19 We have jurisdiction under A.R.S. § 8-235 (2007) and 12-120.21 (2003) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶20 The juvenile court may terminate the parent-child relationship only upon finding that clear and convincing evidence demonstrates at least one statutory ground for severance and that a preponderance of the evidence shows severance is in the child's best interest. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We will affirm the judgment unless the juvenile court abused its discretion by making "factual findings [that] are clearly erroneous[;] that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted).

¶21 Because termination is warranted upon a finding of any one of the grounds listed in A.R.S. § 8-533(B), we need examine only whether ADES presented evidence to support one of the grounds relied on by the court. *Jesus M.*, 203 Ariz. at 280, ¶

3, 53 P.3d at 205. We commence our review with the juvenile court's mental-illness findings.

¶122 Pursuant to A.R.S. § 8-533(B)(3), the juvenile court was authorized to terminate Mother's parental rights upon findings that (1) she was unable to discharge her parental responsibilities due to mental illness or mental deficiency and (2) reasonable grounds existed to believe her condition would "continue for a prolonged indeterminate period."

¶123 Mother first contends that the juvenile court erred by failing to differentiate her mental-health prognosis based on her change in diagnosis, treatment, and medication. Mother started her new therapy in May 2010 and her new medication in September 2010. Mother testified at the January 2011 termination hearing that she believed she was benefitting from the new treatment regime and medication; she argues on appeal that "there was no competent testimony to the contrary." We disagree. In October 2010, Dr. Menendez recommended ceasing all visitations between Mother and the children because "contact would be harmful to the child[ren] based on [Mother's] past and current behavior." Further, CPS specialist Montijo testified in January 2011 that Mother could not adequately parent the children and she did not provide a safe, healthy environment for them. Mother failed to submit any evidence to the juvenile court that her current regime of therapy and medications not

only improved her mental health, but resolved her severe mental-health issues to the point that she was capable of safely and adequately caring for her children. Additionally, Mother failed to cite to this court any case law or statutory law that requires the juvenile court to only consider the current diagnoses and treatments of Mother and not the record as a whole. The record is replete with evidence of Mother's inability to care for her children. She attempted to commit suicide at least twice; she abused drugs; she engaged in violent behavior on repeated occasions and threatened and physically assaulted the police, mental-health professionals, and family members; she was non-compliant with ADES services; she acted inappropriately with her children and has long-standing, extreme mental-health problems. We defer to the juvenile court's ruling and its weighing of the evidence. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004) ("A juvenile court as the trier of fact in a termination proceeding is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.").

¶24 Next, Mother argues that the court erred in concluding that her decision to voluntarily reside in a mental-health facility was evidence of her mental unfitness. The court mentioned Mother's current residence in an 18-hour per day on-

site staff mental-health facility in its ruling pertaining to A.R.S. § 8-533(B)(8)(3). Despite Mother's contentions that the court should not have considered her decision to voluntarily enter the facility, it is very significant that Mother was residing in such a facility while contesting the termination of parental rights. Although Mother's efforts to obtain mental-health services was commendable, nevertheless, her voluntary stay at the mental-health facility demonstrated, in part, that at least at the time of trial, she could not provide the proper housing for the children and that she was not capable of living on her own and caring for herself, let alone caring and financially providing for two children. Again, the juvenile court is in the best position to weigh the evidence. *Oscar O.*, 209 Ariz. at 334, ¶ 4, 100 P.3d at 945. Thus, the court's decision to mention Mother's current residence in its ruling was not error, but one of the circumstances that the court properly considered in evaluating Mother's case.

¶125 Third, Mother maintains that the trial court erred in failing to continue the case in order to determine the effectiveness of Mother's new treatment and medications. Mother contends her attorney's statement that Mother

has sought out her own services and as a result has improved her mental health and is now doing much, much better; that she is deserving of more time because she does suffer from a serious mental illness and she needed more time; that she loves her children and that

she would be able to care for them if this Court gave her more time, and that is her basic request, that this Court consider her mental illness and then give her more time

qualified as a request for a continuance. However, Mother never specifically requested a continuance and the court did not appear to view it as such because it did not rule on it and the minute entry did not reflect such a request. Our review of the record persuades us that Mother did not request a continuance, but rather requested the court deny the motion to sever. Moreover, even if we were to construe the statement by Mother's counsel as a request for continuance, the court would not have abused its discretion in denying it.

¶126 Next, Mother argues that severance was not authorized by A.R.S. § 8-533(B)(8)(c). Sufficient evidence supports the juvenile court's finding that severance was appropriate under A.R.S. § 8-533(B)(3) due to the likelihood that Mother's mental illness would exist for a prolonged indeterminate period. In light of this holding, we need not discuss whether termination was also appropriate under § 8-533(B)(8)(c).

¶127 Finally, Mother argues that she was denied effective assistance of counsel because her attorney did not: (1) have Mother's most recent therapist, Susan Porter, testify; (2) present any evidence about Mother's new treatment and

medication⁶; and (3) have Mother's relatives testify. Mother failed to present this argument to the juvenile court. Although we question whether this court is the appropriate forum to present such a claim, we will nevertheless address it. *Cf. John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 325, ¶ 17, 173 P.3d 1021, 1026 (2007) (assuming arguendo that an ineffective assistance of counsel claim can be made on direct appeal from a termination order).

¶128 In order for Mother to prevail on an effective assistance of counsel claim, she must demonstrate both that her counsel was inadequate and that she suffered prejudice in the resulting termination of her parental rights. *Id.* at ¶ 18 ("[N]o reversal of a termination order is justified by inadequacy of counsel unless, at a minimum, a parent can demonstrate that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different.") Mother fails to show prejudice. Although her therapist, Porter, did not testify at the termination hearing, Porter did submit a

⁶ We will not consider the documents attached to Mother's opening brief because they were not in the record and therefore not part of the record on appeal. See *In re property at 6757 S. Burcham Ave.*, 204 Ariz. 401, 404-05, ¶ 11, 64 P.3d 843, 846-47 (App. 2003).

letter to the court in August 2010 describing her counseling sessions with Mother and stated that Mother would not pose any harm to the children if visitations were restored, but would require continued counseling for a minimum of twelve to twenty-four months. Mother additionally submitted, as an exhibit, Porter's client progress notes completed after each therapy session or telephone call with Mother through July 2010. Under these circumstances, although any progress notes that Porter may have prepared after July 2010 and before the hearing were not submitted to the court,⁷ we cannot say that Porter's failure to testify prejudiced Mother in the outcome of the case.

¶29 Mother also argues that her attorney's failure to present any evidence pertaining to her new treatment and medication also resulted in ineffective assistance of counsel. Although we cannot review the attachments that Mother submitted with her opening brief, we disagree that no evidence was presented about her most recent treatments and medications. Mother testified at the hearing about her current treatment and medication regime and the positive impact it has had in her life. Additionally, Montijo testified that she has failed to see any improvement in Mother since she began working on Mother's case in October 2009 and she did not believe Mother's

⁷ Mother did not have any counseling sessions with Porter between her arrest in late September and eventual release from jail in early December.

current medications, therapy, or treatment program improved her well-being or ability to care for the children. Montijo stated that she spoke with Porter, who said that although Mother has been "engaged in services . . . it hasn't been for a long [enough] period of time to determine if she's made any progress." Thus, there was sufficient evidence provided to the court about Mother's current treatments and medications in order for the court to properly form a basis for its termination decision.

¶30 Last, Mother argues that her attorney's failure to have Mother's relatives testify about her support system demonstrated ineffective assistance of counsel. Again, we disagree. The exclusion of this testimony would not change Mother's long-standing severe mental-health issues, lack of financial support, and lack of a stable home and environment in which she could properly and adequately raise the children. Thus, we need not determine whether Mother's counsel was inadequate because she has not demonstrated any prejudice. *John M.*, 217 Ariz. at 325, ¶ 18, 173 P.3d at 1026. In the absence of prejudice, Mother has failed to establish an ineffective assistance of counsel claim.

CONCLUSION

¶31 For the foregoing reasons, we affirm the termination of Mother's parental rights to the children.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PATRICIA K. NORRIS, Judge