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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

FILED BY CLERK

SEP -6 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CRYSTAL R.,)	2 CA-JV 2013-0022
)	DEPARTMENT A
)	
Appellant,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
v.)	Rule 28, Rules of Civil
)	Appellate Procedure
ARIZONA DEPARTMENT OF ECONOMIC)	
SECURITY and J.S.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. JD201100007

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Crystal R., mother of J.S., born in April 2011, challenges the juvenile court’s order terminating her parental rights to J.S. on the grounds of length of time in court-ordered care, pursuant to A.R.S. § 8-533(B)(8)(c).¹ Crystal argues there was insufficient evidence to establish severance was appropriate. She also maintains the court abused its discretion in finding termination of her parental rights was in J.S.’s best interests. We affirm.

¶2 A juvenile court may terminate a parent’s rights if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent’s rights is in the children’s best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). When reviewing an appeal from an order terminating a parent’s rights, we view the evidence in the light most favorable to sustaining the juvenile court’s ruling. *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Thus, “we will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). That is, we will not disturb the ruling unless the factual findings are clearly erroneous. *Id.*

¹Crystal has three other children, born in 2008, 2010, and 2012, none of whom were under her care at the time of the trial. The parental rights of J.S.’s father, who is not a party to this appeal, were terminated in January 2013.

¶3 The evidence presented at the two-day, contested severance hearing, which took place in January and February 2013,² established that Crystal admitted to “abusing substances” during her pregnancy with J.S. and tested positive for methamphetamine, marijuana, and barbiturates during the pregnancy; and that her pregnancy was characterized as “complicated by maternal drug use.” J.S., who was born at thirty-one weeks’ gestation and weighed 3.9 pounds, was taken into protective custody when he was released from the hospital in May 2011. Crystal “was present at the hospital on only a few occasions and participated very little in the care of her child. She was not present at the hospital at the time of the child’s discharge.” The Arizona Department of Economic Security (ADES) filed a dependency petition and J.S. was adjudicated dependent in June 2011.

¶4 As summarized in the juvenile court’s termination order, Child Protective Services (CPS) and ADES provided Crystal with numerous services in support of reunification, including “[c]ase management, outpatient substance abuse treatment, individual, group and family counseling, psychological evaluation, psychiatric services, supervised visitation, parent aide services, in-home services and transportation services.”

Despite receiving instructions that she should not have contact with individuals who use

²In its answering brief, ADES points out that Crystal has cited to documents that, although part of the record submitted by the superior court, were not admitted into evidence at trial. In her reply brief, Crystal “respectfully request[s] this Court expand the record to include those documents which are already part of the court file.” Because Crystal’s request to expand the record, made in the final paragraph of her reply brief, is neither properly nor timely presented, we deny it. *See* Ariz. R. P. Juv. Ct. 104(F)(1) (supplemental designation of record); Ariz. R. Civ. App. P. 11(a)(5) (motion to request exhibits necessary to determination of appeal).

or provide drugs (including J.S.'s father), or who are sex offenders, Crystal continued to see J.S.'s father, an individual she acknowledged was unable to control his substance use, and whom she had witnessed "smoking marijuana and crystal meth."

¶5 Although CPS reported to the court in October 2011 that Crystal was "attending and participating [in services]" and that her drug results were negative, CPS also reported Crystal "is not showing progress. Crystal allows everyone to walk all over her and take advantage of her. Crystal must learn to make appropriate decisions so she does not fail with her case plan." In November 2011, it was reported that Crystal was not participating in the domestic violence portion of her treatment. Similarly, after Crystal was discharged from individual counseling and substance abuse classes in January 2012, she refused to participate in the aftercare program that was offered to her. In addition, Crystal testified at trial that although she had "[k]ind of" paid attention during domestic violence classes, she did not "overall" learn very much.

¶6 In June 2012, Crystal completed a psychological evaluation and told the psychologist she and J.S.'s father were dating again. The psychologist diagnosed Crystal with dependent personality disorder, depressive disorder not otherwise specified, and anxiety disorder, and advised against returning the children to Crystal at that time. The psychologist suggested Crystal would benefit from participation in weekly intensive counseling sessions with a master or doctorate level therapist. The following month, Crystal refused to submit to a drug test,³ a few days after which she "went to a party . . . ,

³Crystal subsequently agreed to complete the requested drug test.

had a few drinks . . . , [and] got in a physical altercation with [the] paternal grandmother, allegedly while [Crystal] was holding [her infant daughter].”

¶7 During the course of the dependency, Crystal exhibited additional conduct that demonstrated questionable judgment: when J.S.’s sister was born in 2012, Crystal stayed with a family member where a registered sex offender was living; she stayed at the home of the paternal grandmother, who used “substances,” while J.S.’s father was living there; and most notably, she testified that, despite knowing that J.S.’s father had abused her, was violent, and used drugs, she permitted him to move in with her “[b]ecause he wanted to.” In October 2012, ADES filed a motion to terminate the parents’ rights to J.S. on the grounds of length of time in court-ordered care. Later that month, a police officer responded to a domestic violence call at Crystal’s apartment involving J.S.’s father, who Crystal described to officers as her “boyfriend.”

¶8 On appeal, Crystal first argues that ADES and CPS did not make diligent reunification efforts. She specifically asserts that CPS “failed in its obligation to provide” the additional counseling suggested by the psychologist in the 2012 evaluation, and that such counseling “would have enabled her to change the very behaviors that gave [ADES] concern.” She also maintains that based on her “learning disorder and . . . IQ level,” she should not have been required to request such services. Apparently referring to the former version of § 8-533(B)(8)(a), which previously was numbered as § 8-533(B)(6)(a), *see* 1988 Ariz. Sess. Laws, ch. 50, § 1; 2008 Ariz. Sess. Laws, ch. 198, § 2, Crystal argues that a parent will not be regarded as having substantially neglected to

remedy the circumstances that caused a child to remain out of the home pursuant to court order if the parent has made “appreciable good faith efforts to comply with” the case plan, even if the child has been out of the home for more than a year.

¶9 ADES has a statutory obligation to reunify the family. *Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, ¶ 19, 219 P.3d 296, 303 (App. 2009). In determining whether severance is appropriate, the juvenile court must consider the availability of reunification services to the parent and the parent’s participation in the services and must find that ADES made a diligent effort to provide those services. A.R.S. § 8-533(B)(8), (D); *Christina G. v. Ariz. Dep’t of Econ. Sec.*, 227 Ariz. 231, ¶ 14, 256 P.3d 628, 632 (App. 2011). And, although ADES must give a parent the time and opportunity to participate in programs designed to improve the parent’s ability to care for his or her child, *see Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶ 37, 971 P.2d 1046, 1053 (App. 1999), it is not required to provide every conceivable service or ensure that a parent participates in each service offered, *see In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). ADES satisfies its duty when it provides the parent with the type of therapy that offers the most hope for enabling that parent to carry out his or her parental responsibilities. *See In re Maricopa Cnty. Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 189, 692 P.2d 1027, 1038 (App. 1984). And ADES is not required to provide services that would be futile. *See Mary Ellen C.*, 193 Ariz. 185, ¶ 34, 971 P.2d at 1053.

¶10 In its findings of fact and conclusions of law, the juvenile court specifically found that ADES had made diligent efforts to provide reunification services, as § 8-533(B)(8) and (D) require, and then summarized the services provided, as set forth above. Noting that Crystal “ha[d] participated in services throughout the case, sometimes consistently and other times with less frequency,” the court nonetheless concluded “she has failed to make the behavioral changes necessary to enable her to safely parent her child” and “has continued to associate with individuals who are known drug users and/or known to be involved in criminal activity, including the father.” The court further concluded Crystal “has continued to make poor decisions that impair[] her ability to safely parent.”

¶11 In addition, the juvenile court summarized some of the events that had occurred during the dependency, including the following: Crystal had left J.S. in the care of his father and “others who were actively abusing substances” in 2011; in July 2012, Crystal and her children had stayed at the paternal grandmother’s home, where J.S.’s father was also staying; Crystal had been involved in a physical altercation with the paternal grandmother while she was “holding [J.S.’s infant sister] in her arms”; Crystal “refused to submit to drug testing and failed to inform [ADES] of her whereabouts for approximately a week”; in September 2012, Crystal had been observed on a gas station surveillance film with J.S.’s father and two other individuals, one of whom later committed armed robbery at the gas station and remained at Crystal’s home until the police apprehended him.

¶12 Moreover, throughout the dependency, the juvenile court repeatedly found ADES had made reasonable efforts toward reunification by providing appropriate and necessary services, findings Crystal did not challenge despite having the opportunity to do so, even after the results of the psychological evaluation had been provided to the court. When asked at trial if “there [were] any other service that [she] didn’t do that [she] wish[ed she] could have done,” Crystal responded, “[n]ot that I know of, no.” And her case manager testified that Crystal had not requested any additional or different services than those which ADES had provided for her. And notably, Crystal’s individual counselor testified that when the psychologist had made the recommendations based on the psychological evaluation, Crystal “had already done a great deal of [the recommendations].” Therefore, we agree with ADES that Crystal has waived the right to challenge the appropriateness of the services ADES had provided. As ADES correctly observes, this court stated in *Christina G.* that a parent who does not challenge these findings and does not request a hearing on the kinds of services being provided can be regarded as having waived the issue on appeal. 227 Ariz. 231, n.8, 256 P.3d at 632 n.8.

¶13 And, even if not waived, Crystal’s argument lacks merit. First, as a sub-issue to the challenge of services provided, Crystal maintains that a parent is not to be regarded as having substantially neglected to remedy the circumstances that caused a child to remain out of the home pursuant to court order if the parent has made appreciable, good-faith efforts to comply with the case plan, even if the child has been out of the home for more than one year. Crystal suggests she had made such efforts here.

But Crystal's assertion and the case she relies on to support it, *In re Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 869 P.2d 1224 (App. 1994), relate to terminations under § 8-533(B)(8)(a) (child in out-of-home placement for cumulative total period of nine months or longer pursuant to court order and parent substantially neglected or willfully refused to remedy circumstances that cause child to be out of home). Here, Crystal's rights were terminated pursuant to § 8-533(B)(8)(c), and that subsection does not require a showing of substantial neglect or willful refusal to remedy the circumstances that caused the child to remain out of the home. Rather, it states a parent's rights may be terminated if the child has been out of the home pursuant to court order for fifteen months or longer and "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." A.R.S. § 8-533(B)(8)(c). Therefore, we do not address this aspect of Crystal's argument further.

¶14 Moreover, we reject Crystal's challenge to the sufficiency of the evidence supporting the juvenile court's finding that ADES diligently had provided appropriate reunification services, a finding supported by reasonable evidence in the record. As ADES noted, and the record shows, during the twenty-one-month dependency, ADES offered Crystal "visitation, parent-aide services, individual counseling, drug testing, substance-abuse treatment and an aftercare program, parenting and domestic-violence classes, a psychological evaluation, and in-home transitional parenting services." In light

of the overwhelming evidence before the court supporting severance based on out-of-home placement, including all of the services ADES did, in fact, provide, we do not find its failure to have urged Crystal to participate in additional counseling after the psychological evaluation was completed to be sufficient grounds for reversal.

¶15 We also reject Crystal’s claim that, by having remained drug free during the dependency, she did in fact remedy the circumstances that caused the out-of-home placement, which she characterizes as primarily related to her “use of illicit drugs before and during her pregnancy.” However, contrary to Crystal’s suggestion, the “circumstances that cause the . . . out-of-home placement” are those “circumstances existing at the time of the severance rather than at the time of the initial dependency petition.” *In re Maricopa Cnty. Juv. Action No. JS-8441*, 175 Ariz. 463, 467-68, 857 P.2d 1317, 1321-22 (App. 1993), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, 110 P.3d 1013.

¶16 Crystal next argues there was insufficient evidence to support the juvenile court’s finding she would be unable to exercise proper and effective parental care in the future. However, based on Crystal’s ongoing demonstration of poor judgment including, most notably, her repeated contact with J.S.’s father, there was more than sufficient evidence for the court to conclude she would be unable to exercise proper and effective parental care in the future. And, even if Crystal has recently “cut all ties” with J.S.’s father, that does not obviate her considerable history of poor decision making and did not require the court to conclude she could exercise proper parental care. Crystal’s case

manager testified that even in the six months before trial Crystal continued to have contact with J.S.'s father, had been involved in at least three domestic violence incidents, and noted that she had exhibited an overall "pattern" of poor decision making. By the time of the severance hearing, J.S. had been in an out-of-home placement for approximately twenty-one months, well beyond the fifteen months required under § 8-533(B)(8)(c), and more than sufficient time for the court to conclude Crystal would be unable to exercise proper and effective parental care in the future. Moreover, Crystal's case plan required not only that she participate in services, but that she benefit from them. Crystal's case manager testified: "You have to not only do services, but you have to show that they've helped, that [your] behavior has changed. . . . [Crystal's] behavior has not changed. Her decision making has not been appropriate."

¶17 Finally, we reject Crystal's claim that there was insufficient evidence to support the juvenile court's best interests finding, and her incorrect assertion that "[s]everance is only in [J.S.'s] best interests if his relationship with his mother is detrimental to him." She also points to evidence that J.S. was "excited and very happy" to see his mother, a relationship she contends the court ignored. To establish termination of Crystal's rights was in the best interests of J.S., ADES was required to show J.S. "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). Among the factors relevant to this determination is whether a current plan for the child's adoption exists. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207

Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). The court may also consider whether the current placement is meeting the children’s needs. *See In re Maricopa Cnty. Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994).

¶18 Finding termination was in J.S.’s best interests, the juvenile court noted that J.S. had resided with his foster care family since he was one month old. The court found that J.S.’s current family, who “provide for all of his needs,” wants to adopt J.S., and that termination of Crystal’s parental rights “would further the plan of adoption and provide the child with permanency and stability.” The court also found that J.S. is “observably attached” to the family and he “is thriving in their care.”

¶19 The CPS case manager testified that terminating Crystal’s parental rights would be in J.S.’s best interests because “[t]hroughout the whole case we have offered all these services that she’s completed, but her behavior . . . has not [changed]. She continues to make bad decisions that lead her into trouble and that can cause harm to the children if she had them in her care.” The case manager acknowledged that placing the children in Crystal’s care “would most likely endanger their welfare.” She explained that J.S.⁴ considers his foster parents as his “mom and dad”:

[I]t would be very traumatizing to him if he no longer live[d] with them or [wa]s around them. . . . [H]e just knows Crystal as another person, but not to a point where he’s bonded so much like he has with [his current family]. It would be detrimental to him if he [c]ouldn’t be with them.

⁴During a portion of her testimony, the case manager appears to mistakenly have used the name of J.S.’s brother rather than J.S.

In summary, sufficient evidence supported the juvenile court’s best interests finding. Accordingly, to the extent Crystal asks us to reweigh the evidence or substitute our judgment for that of the juvenile court regarding J.S.’s best interests, we will not do so. *See Oscar O.*, 209 Ariz. 332, ¶¶ 4, 14, 100 P.3d at 945, 947 (juvenile court “in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts”).

¶20 Therefore, we affirm the juvenile court’s order terminating Crystal’s parental rights to J.S.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge