

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

TAMRA H.,
Appellant,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY AND J.H.,
Appellees.

No. 2 CA-JV 2013-0058
Filed January 6, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. J19961300
The Honorable Catherine Woods, Judge

AFFIRMED

COUNSEL

Emily Danies, Tucson
Counsel for Appellant

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Thomas C. Horne, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Arizona Department of Economic Security

Pima County Office of Children's Counsel
By Nicholas Knauer, Tucson
Counsel for Appellee J.H.

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Tamra H. appeals from the juvenile court's order terminating her parental rights to her son, J.H., born in April 2010, on the grounds of neglect pursuant to A.R.S. § 8-533(B)(2) and mental illness and/or deficiency pursuant to § 8-533(B)(3). Tamra argues on appeal that there was insufficient evidence to support either ground for termination or the court's finding that termination was in J.H.'s best interests, and that trial counsel had been ineffective in failing to adequately challenge the "scientific basis" of a psychologist's testimony relevant to termination under § 8-533(B)(3). We affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's order. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). Tamra's intellectual functioning was measured to be in the mild mentally impaired range. She has academic skills equivalent to a seven- to eight-year old, which "is below the level . . . typically considered minimal for adaptive independent functioning." In October 2011, investigators from Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), removed J.H. from Tamra's home after visiting the home pursuant to a report that the home was unsafe. The home was filthy and infested with

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cockroaches, with human and canine feces in several rooms and “piles of garbage everywhere,” including broken glass. J.H. was found sleeping on foam mats, with cockroaches on him and on his bedding. He had untreated cuts on his feet, and Tamra informed investigators he did not have any shoes. While investigators were present, Tamra repeatedly tried to give J.H. obviously spoiled milk despite being warned by a sheriff’s deputy that the milk was unsafe to drink.

¶3 After J.H.’s removal, Tamra consistently participated in services but, even after moving to a new apartment, was unable to maintain hygienic living conditions suitable for J.H. In September 2012, ADES moved to terminate Tamra’s parental rights pursuant to § 8-533(B)(2) and (3). At the contested termination hearing, a visitation facilitator testified Tamra had made improvements but remained inconsistent in her parenting ability in several areas, such as changing J.H.’s diaper and toilet training. A psychologist who evaluated Tamra stated she could not independently care for J.H. and would not be able to do so in the foreseeable future. A family therapist testified that, even after ten months of therapy, Tamra needed “redirection” at each session when attempting to address various parenting tasks, had not benefitted from therapy, and could not engage in parenting tasks without supervision. The juvenile court found ADES had demonstrated termination was warranted on both grounds alleged and termination was in J.H.’s best interests. This appeal followed.

¶4 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and “shall also consider the best interests of the child.” *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d at 1265-66.

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¶5 Tamra argues that insufficient evidence supports termination on the basis of neglect pursuant to § 8-533(B)(2). That subsection provides for termination if a “parent has neglected or willfully abused a child.” Neglect, as defined by A.R.S. § 8-201(22)(a), includes a parent’s failure “to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child’s health or welfare.”

¶6 Tamra does not suggest, however, that the circumstances in which J.H. originally was found in her home do not constitute neglect, which they clearly do. She instead focuses on her conduct after J.H. had been removed from her care; specifically, she had moved to a new apartment, maintained a cleaner environment, and participated consistently in services. Relying on *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007), she claims whether termination is warranted on neglect grounds is dependent on the circumstances existing at the time of the termination and argues that she had “remedied the neglect issue as a ground for termination” and that ADES produced no evidence “that she would neglect [J.H.] in the future.”

¶7 But the court in *Marina P.* addressed termination based on a parent’s inability to remedy the circumstances that caused out-of-home placement under § 8-533(B)(8). *Id.* ¶ 18. That subsection permits termination of parental rights based on a parent’s failure to remedy some previously existing circumstance within specified timeframes. Section 8-533(B)(2), in contrast, refers only to a past instance of abuse or neglect—not the current potential for abuse or neglect or the parent’s failure to take steps to minimize the potential for abuse or neglect. We must apply plain, unambiguous statutory language as written because it is the best indicator of legislative intent. *See Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, ¶ 8, 117 P.3d 795, 797 (App. 2005).

¶8 The legislature has phrased some termination grounds in the present tense, such as mental illness or deficiency and the failure to remedy previous circumstances, *see* § 8-533(B)(3), (8), and

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others in the past tense, like abandonment and abuse or neglect, § 8-533(B)(1), (2). This distinction demonstrates that the legislature intended for a parent's rights to be subject to termination based solely on past abuse—had it intended that the state also demonstrate a risk of future abuse or neglect it would have said so. And Tamra cites no authority suggesting that ADES must demonstrate the likelihood of prospective abuse or neglect to prove that termination of a parent's rights under § 8-533(B)(2) is appropriate.¹

¶9 Tamra complains that, if the state need not demonstrate a continuing risk of neglect, “there is no purpose for any reunification services.” But she does not explain how that fact, even if true, would permit us to disregard the statute's plain language. In any event, a lack of continuing risk of abuse or neglect would be relevant to a juvenile court's best-interests finding. See *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, ¶ 31, 231 P.2d 377, 383 (App. 2010) (potential of harm to child relevant to best interests finding). Tamra has identified no basis for us to disturb the juvenile court's conclusion that termination of Tamra's parental rights is warranted under § 8-533(B)(2).² Thus, we need not address Tamra's arguments regarding § 8-533(B)(3), including her claim of ineffective assistance of counsel. See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246,

¹ We acknowledge that, in order to demonstrate that termination of a parent's rights to one child based on his or her abuse or neglect of another child, the state is required to show a constitutional nexus between the prior abuse and the risk of future abuse. See *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, ¶ 16, 257 P.3d 1162, 1165-66 (App. 2011). Because Tamra does not assert a constitutional nexus must exist between past neglect and future neglect of the same child, we do not address this potential issue. See *In re MH 2008-002596*, 223 Ariz. 32, n.1, 219 P.2d 242, 244, n.1 (App. 2009).

²Even were ADES required to establish a risk of future neglect, the juvenile court expressly made that finding, which is amply supported by the evidence. In light of the substantial evidence that Tamra is not capable of independently parenting J.H., future neglect reasonably can be inferred.

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¶ 27, 995 P.2d 682, 687 (2000) (if termination upheld on any one ground, other grounds need not be addressed).

¶10 Tamra additionally claims the juvenile court erred in concluding termination was in J.H.'s best interests. She argues that, because she and J.H. are "very bonded," termination is not in his best interests. But her argument essentially asks us to reweigh the evidence on appeal, which we will not do. See *Jesus M. v. Ariz. Dep't of Econ Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). Despite the evidence of affection and bonding between Tamra and J.H., there is substantial evidence that she is not capable of becoming an effective parent. Moreover, two case managers testified that J.H. was adoptable and needed the opportunity for permanency that termination of Tamra's parental rights would provide. See *Raymond F.*, 224 Ariz. 373, ¶ 30, 231 P.3d at 383 (whether child adoptable relevant to best interests); *Jesus M.*, 203 Ariz. 278, ¶ 15, 53 P.3d at 207 (stability relevant to best interests).

¶11 The juvenile court's order terminating Tamra's parental rights to J.H. is affirmed.