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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KAYLA S., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, L.S., *Appellees*.

No. 1 CA-JV 15-0398
FILED 7-14-2016

Appeal from the Superior Court in Maricopa County
No. JD23720
The Honorable Connie Contes, Judge

AFFIRMED

COUNSEL

Maricopa County Public Advocate's Office, Mesa
By Suzanne Sanchez
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By JoAnn Falgout
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and John C. Gemmill joined.

T H U M M A, Judge:

¶1 Kayla S. (Mother) appeals from the superior court's order terminating her parental rights to L.S. Mother argues the superior court should have declared a mistrial for a disclosure violation and that the Department of Child Safety (DCS) did not make a diligent effort to provide appropriate reunification services. Because Mother has shown no error, the order is affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 L.S. was born in May 2013 and tested positive for methamphetamine at birth. Mother had tested positive for amphetamines during pre-natal visits and at the time of L.S.' birth. Consequently, DCS took L.S. into care and placed him with his maternal grandfather, where he has lived ever since. DCS filed a dependency petition and, after Mother and Father (who is not a party to this appeal) denied the allegations but submitted the matter to the court, in July 2013, the court found L.S. dependent as to both parents. The court adopted a case plan of family reunification concurrent with severance and adoption. Also in July 2013, without apparent objection, the court ordered DCS to provide and Mother to participate in "random urinalysis testing, substance abuse assessment and treatment, [and] parent aide services after 60 days of sobriety." The court found these "services are necessary and reasonable."

¶3 Given L.S.'s age, Mother had six months to remedy the circumstances that caused the child to be in an out-of-home placement or face a change in case plan that could include severance. *See* Ariz. Rev. Stat.

¹ This court views the evidence in the light most favorable to sustaining the superior court's findings. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207 ¶ 2 (App. 2008).

KAYLA S. v. DCS, L.S.
Decision of the Court

(A.R.S.) § 8-862(A)(2) (2016).² In fact, however, Mother was provided nearly two years to do so.

¶4 In the nearly two years that followed, DCS provided Mother various services, including: mental health and substance abuse assessments and treatment; drug testing; a parent aide; visitation; counseling; and transportation. DCS informed Mother that to be reunited with L.S., she would need to demonstrate her ability to provide for all of L.S.' needs by participating in the services provided, maintaining a sober lifestyle and sustaining stable income and housing.

¶5 At review hearings in October 2013, December 2013, March 2014, June 2014, August 2014 and November 2014, the court reaffirmed the case plan and found, without apparent objection, that DCS "has made reasonable efforts to finalize the permanency plan for the child," typically adding that "the services in place are necessary and appropriate." In June 2014, the court ordered that DCS make a referral for individual counseling for Mother to address issues identified in a psychological evaluation. By late 2014, Mother was living in housing deemed appropriate by DCS and DCS was preparing to return L.S. to Mother's custody, but Mother left that housing. As a result, because Mother no longer had stable housing, DCS was unable to reunify L.S. and Mother.

¶6 At a review hearing in February 2015, the court changed the case plan to severance and adoption. In doing so, the court again found DCS "has made reasonable efforts to finalize the permanency plan for the child." In March 2015, DCS filed a motion to terminate Mother's parental rights, alleging 15-months time-in-care. *See* A.R.S § 8-533(B)(8)(c). The motion stated DCS had made a diligent effort to provide appropriate reunification services, listing some of the services provided, that Mother had been unable to remedy the circumstances that caused L.S. to be in an out-of-home placement and that there was a substantial likelihood Mother would not be capable of exercising proper and effective parental care and control in the near future.

¶7 The termination adjudication was held on July 20, 2015 and August 7, 2015. At the adjudication, the court received evidence that, during the two years L.S. was in care, Mother moved 10 times to various apartments, homeless shelters and support centers. During this same time, Mother changed jobs seven times. At the time of the hearing, Mother

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

KAYLA S. v. DCS, L.S.
Decision of the Court

testified she had been employed for two months, earning \$10 per hour, but provided no confirming documentation. Although she testified to working continuously for six different employers during the two years, she provided DCS with only one pay stub.

¶8 The record also reveals that after Mother completed a psychological evaluation in April 2014, DCS submitted a referral for counseling, but Mother did not schedule an appointment. She did not begin counseling until May 2015, after another DCS referral. Mother missed one of her three counseling sessions in June 2015, but participated in two others. Mother testified that she participated in counseling at the various shelters and centers where she lived, but provided no supporting documentation.

¶9 In addition to testifying about the services offered to Mother, the DCS case manager testified that Mother cannot provide the safe housing and stable income needed to provide for L.S.' needs. And she also testified that severance is in his best interests because he is currently in a stable home that is an adoptive placement. The case worker testified that DCS provided all available services that would have helped Mother work towards reunification. Moreover, the case worker testified that DCS could not provide Mother with housing subsidies until she had established stable employment.

¶10 The caseworker's testimony on July 20, 2015 suggested that not all of DCS's files were disclosed to Mother before the hearing. DCS maintains an electronic database called CHILDS but also maintains a separate hard file. The caseworker testified that two referrals for counseling were made for Mother (apparently March 2014 and November 2014), but CHILDS only contained a November 2014 referral. The caseworker added that "not all the referrals get put into CHILDS," but that all referrals should be reflected in the hard file. At Mother's request, the court held a sidebar out of Mother's hearing that was not transcribed. After that sidebar, Mother's counsel did not address the disclosure issue again on July 20, 2015 but said he would do so in closing arguments.

¶11 Although Mother, by counsel, had nearly three weeks between the next adjudication hearing date, there was no request made of DCS to review the hard file. Mother, however, made an oral motion for a mistrial based on the disclosure issue, arguing she could not properly prepare for trial. The court denied the oral motion but allowed Mother to file a motion in writing. Mother later filed a written motion, which the court denied after full briefing.

¶12 After taking the matter under advisement, the superior court granted the motion to terminate, finding L.S. had been in an out-of-home placement for 15 months or longer, DCS had made diligent efforts to provide Mother with appropriate reunification services and Mother had been unable to remedy the circumstances that caused the out-of-home placement. The court also found a substantial likelihood that Mother would not be capable of exercising effective parental control in the near future, and severance was in the child's best interests. This court has jurisdiction over Mother's timely appeal pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1) and -2101(A)(1) and Arizona Rules of Procedure for the Juvenile Court 103-04.

DISCUSSION

I. The Superior Court Did Not Abuse Its Discretion By Denying Mother's Motion For A Mistrial.

¶13 DCS had an obligation to disclose to Mother "[a]ll information which is not privileged." Ariz. R.P. Juv. Ct. 44(A). The "court may impose sanctions upon a party who fails to disclose information in its possession which is subject to disclosure." Ariz. R.P. Juv. Ct. 44(G). Sanctions imposed should be consistent with the best interests of the child. See Ariz. R.P. Juv. Ct. 36 ("The rules should be interpreted in a manner designed to protect the best interests of the child.") "The primary consideration in a dependency case is always the best interest of the child. Accordingly, the juvenile court is vested with a great deal of discretion." Ariz. Dep't of Econ. Sec. v. Superior Court, 178 Ariz. 236, 239 (App. 1994) (citation omitted). Although the law of mistrials in a bench trial, like the adjudication, is not robust, this court has long stated in criminal jury trials "that a mistrial is a 'most dramatic' remedy that should be granted only when it appears that that is the only remedy to ensure justice is done." *State v. Blackman*, 201 Ariz. 527, 538 ¶ 41 (App. 2002) (citation omitted).

¶14 Mother argues the superior court erred by denying her motion for a mistrial because DCS failed to disclose the hard file showing "family-reunification service referrals that it claimed existed," adding "[t]he existence, or nonexistence, of such referrals pertained to Mother's argument that DCS had failed to make a diligent effort to reunify the family. Therefore, the disclosure violation prejudiced Mother." Given this disclosure issue, Mother argues the superior court's denial of her motion for mistrial violated her due process rights.

¶15 Given the record, this court assumes (without deciding) that: (1) DCS did not make a pretrial disclosure of the entire hard file; (2) the

KAYLA S. v. DCS, L.S.
Decision of the Court

contents of the hard file were not fully reflected in the electronic CHILDS records that were timely disclosed; (3) this discrepancy was material in that the hard file showed at least one referral that the CHILDS records did not (a March 2014 referral for counseling) and (4) the additional referral was relevant. Even with those assumptions, however, Mother has not shown how the superior court abused its discretion in denying her motion for a mistrial.

¶16 First, the record does not suggest that Mother disputed that a March 2014 referral for counseling had been made and that it was closed out because an intake was never scheduled.

¶17 Second, and relatedly, Mother fails to show how the lack of disclosure of the March 2014 referral prejudiced her.

¶18 Third, Mother had nearly three weeks between the July 20, 2015 first day of trial -- where the disclosure issue came to light -- and the August 7, 2015 second day of trial to request and secure a copy of the hard file but did not do so. Instead, when asked by the court on August 7, 2015 about any follow up taken, Mother's counsel stated "[u]nfortunately I have not been able to, I've been waiting for the transcript" from the July 2015 hearing. The superior court properly could have found a transcript from the July 20, 2015 hearing was not a prerequisite to requesting to review the hard file before the August 7, 2015 hearing.

¶19 Finally, Mother's counsel expressly disavowed lesser sanctions, such as a continuance, that could have cured any perceived prejudice short of the extreme remedy of a mistrial.

¶20 Disclosure obligations are a bedrock principle of juvenile court. *See* Ariz. R.P. Juv. Ct. 44(A). And a superior court has substantial discretion to impose appropriate sanctions for any failure to provide proper disclosure. Ariz. R.P. Juv. Ct. 44(G). On this record, Mother has failed to show the superior court abused its discretion by declining her request for a mistrial.

II. The Superior Court Did Not Err By Finding DCS Made A Diligent Effort To Provide Appropriate Reunification Services.

¶21 As applicable here, to terminate parental rights, a court must find by clear and convincing evidence that at least one statutory ground articulated in A.R.S. § 8-533(B) has been proven, and must find by a preponderance of the evidence that termination is in the best interests of the

KAYLA S. v. DCS, L.S.
Decision of the Court

child.³ See *Kent K. v. Bobby M.*, 210 Ariz. 279, 288 ¶ 41 (2005); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249 ¶ 12 (2000). Because the superior court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts," this court will affirm an order terminating parental rights so long as it is supported by reasonable evidence. *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 93 ¶ 18 (App. 2009) (citation omitted).

¶22 DCS was required to prove that L.S. has been in an out-of-home placement for a cumulative period of 15 months or longer pursuant to court order, DCS made a diligent effort to provide appropriate reunification services, Mother has been unable to remedy the circumstances causing the out-of-home placement and there is a substantial likelihood Mother "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).

¶23 Mother argues DCS failed to diligently provide appropriate reunification services. Mother points to the confusion about whether one or two counseling referrals were made for Mother. Although the disparity suggests a gap in record keeping, it is not evidence of a lack of diligence in providing appropriate reunification services. The record is undisputed that DCS made two referrals, the first of which was closed out when Mother did not make an appointment for the counseling. This necessitated the second referral, which was successful but with resulting delay.

¶24 Mother has not pointed to any appropriate services DCS should have provided that were not provided. The record shows that DCS provided counseling, parent aide, mental health and substance abuse assessments, drug testing and transportation. And as noted above, the record indicates that the superior court repeatedly found these services were appropriate without objection. On this record, the superior court could properly conclude that Mother was unable to maintain stable income and housing during the more than two years that L.S. has been in an out-of-home placement. Accordingly, Mother has not shown that the superior court erred by terminating her parental rights.

³ Mother does not challenge the superior court's best interests finding or the statutory grounds for severance, other than by claiming DCS failed to make a diligent effort to provide appropriate reunification services.

KAYLA S. v. DCS, L.S.
Decision of the Court

CONCLUSION

¶25 The superior court's order terminating Mother's parental rights to L.S. is affirmed.



Ruth A. Willingham · Clerk of the Court
FILED: AA