KATHRYN C. v. DCS and C.C., A.C. and JESSE H.

2022 | Cited 0 times | Court of Appeals of Arizona | June 8, 2022

IN THE ARIZONA COURT OF APPEALS DIVISION TWO

FREDERICK C. AND KATHRYN C., Appellants,

v.

DEPARTMENT OF CHILD SAFETY, JESSE H., C.C., AND A.C., Appellees.

No. 2 CA-JV 2021-0157 and No. 2 CA-JV 2022-0002 (Consolidated) Filed May 25, 2022

Appeal from the Superior Court in Pima County No. JD20180208 The Honorable Casey F. McGinley, Judge

AFFIRMED

COUNSEL

Domingo DeGrazia, Tucson Counsel for Appellant Frederick C.

and

Joel Feinman, Pima County Public Defender By David J. Euchner, Assistant Public Defender, Tucson Counsel for Appellant Kathryn C. Mark Brnovich, Arizona Attorney General By James W. Rappaport, Assistant Attorney General, Tucson Counsel for Appellee Department of Child Safety

The Huff Law Firm PLLC, Tucson By Daniel R. Huff Counsel for Appellee Jesse H.

David Miller, Tucson Counsel for Appellees C.C. and A.C.

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

B R E A R C L I F F E, Judge:

¶1 order establishing a permanent guardianship for their children, C.C. (born

in January 2007) and A.C. (born in April 2012). They maintain the Department of Child Safety (DCS) failed to provide reunification services and the court misapplied the guardianship statute, A.R.S. § 8-871(A). For the following reasons, we affirm.

Factual and Procedural Background

¶2 Frederick and Kathryn are the biological parents of C.C., A.C., Z.C. (born in August 2014), and J.C. (born in November 2015). 1 In July 2016, the family was evicted from their Texas home and was living in a hotel. agreed that the two oldest children, C.C. and A.C., could temporarily stay with him in Tucson, while Frederick and Kathryn got] would remain in Tucson through the 2016-2017 school year. In the summer

of 2017, however, Kathryn was still looking for employment, and the children remained with Jesse, who resides with the maternal grandmother.

1 J.C. and Z.C. remained in the custody of their parents in Texas during the pendency of these proceedings. Although the parents did not visit C.C. and A.C., they regularly communicated by telephone and text. The parents occasionally sent money and gifts, but, in April 2018, A.C. needed extensive dental work, which Jesse largely paid for.

¶3 That same month, Jesse filed a dependency petition, alleging C.C. and A.C. were dependent as to Frederick and Kathryn because of their asserted the parents had engaged in domestic violence and drug use in front of the children, the children had suffered physical abuse by the parents, and Frederick suffered from mental-health issues. Shortly thereafter, Jesse also filed a petition for termination of the parent-child relationship based on mental illness or chronic substance abuse. At a hearing in May 2018, the juvenile court ordered that the parents have telephone contact with the children three times per week supervised by a neutral third party.

¶4 At the combined contested dependency and severance trial in September 2018, the parties informed the juvenile court they had reached an agreement for Jesse to serve as permanent guardian of C.C. and A.C. and for the parents to enter a no contest plea to the dependency petition. However, at the next hearing, Frederick and Kathryn moved to set aside their agreement. The court later granted that motion, explaining that the parents had withdrawn their consent before it had entered any findings or orders. The court therefore reset the matter for trial in February 2019.

¶5 After the trial, but before the juvenile court had issued its ruling, Kathryn filed a motion to enforce the May 2018 visitation order, alleging that telephone contact between the parents and children had stopped after the September 2018 hearing. Jesse responded that, while he had stopped paying for a professional agency to facilitate contact, he continued to offer C.C. and A.C. the opportunity to call their parents, but they repeatedly declined to do so. C.C. and A.C. response and reiterated that they not desire any contact with their

¶6 Meanwhile, in April 2019, the juvenile court issued its under-advisement ruling on the contested dependency and termination. Although the court found that Jesse had not established the statutory grounds for termination, it adjudicated C.C. and A.C. dependent as to Frederick and Kathryn and ordered DCS to substitute as petitioner. This court affirmed the order denying termination on appeal. C.C., A.C., & Jesse H. v. Kathryn C. & Frederick C., Nos. 2 CA-JV 2019-0049, 2 CA-JV 2019-0052 (Ariz. App. Sept. 17, 2019) (consol. mem. decision).

¶7 At the May 2019 hearing on visitation, the parents also requested that the children be seen by different therapists. The children objected to that request. The juvenile court determined that visitation had stopped based on , and ordered visitation to resume only after there was a therapeutic

recommendation for it. The court also declined to change therapists.

¶8 At a hearing in September 2019, the juvenile court set a case plan goal of family reunification and ordered the parents to drug test. Although the parties disputed whether DCS had made reasonable efforts to provide reunification services, the court declined to make any such finding at that time and directed DCS to assist in Texas.

In December 2019, Kathryn and the children separately filed objections to a finding that DCS had made reasonable efforts. At review hearings in early 2020, the court again declined to make a reasonable-efforts finding, noting hear testimony clearly to create a good record and to be able to judge the credibility of the witnesses

¶9 pists would not provide recommendations on visitation or reunification. DCS referred the case for a clinical family assessment to evaluate the relationship and bond between the parents and children. After some initial delay, 2 Dr. Dee Winsky, a licensed psychologist, received the referral. However, the amount authorized for her compensation was insufficient for a family assessment. Winsky therefore suggested a less extensive best-interests evaluation, stating she would only seek additional compensation if she determined it was necessary to meet with the parents.

¶10 Dr. Winsky interviewed C.C. and A.C. in March 2020. When she asked the children about their parents 2

The children requested a specific individual complete the assessment, but the DCS supervisor was

unsuccessful, despite several meetings, in getting approval for that person, apparently, at least in part, because of the amount requested to complete the work. The caseworker also later learned that DCS had stopped offering clinical family assessments in mid-2018. and reported that their parents had physically and verbally abused them. Winsky She completed the best-interests evaluation without interviewing the

parents, explaining that interviewing other family members . . . would not

¶11 At an April 2020 hearing, the juvenile court determined that DCS reserved its finding of reasonable efforts as to the prior period. The services

at that time included: a referral for a best-interests evaluation, a referral to a counseling center, a referral to a drug-testing site, a child safety assessment, a behavioral change assessment, and an in-home safety analysis. to its visitation order but encouraged the parties to seek reconsideration of that order when appropriate.

¶12 In June 2020, after taking additional testimony and evidence, the juvenile court took the issue of the earlier finding of reasonable efforts under advisement. The court issued its written ruling later that month. The forts, explaining that DCS was perilously close to a finding that they had not provided reasonable efforts for the time period at issue case planning, case

management services, attempts to facilitate drug testing, standard records requests and subpoenas to [Veterans Affairs (VA)] regarding counseling services and individual therapy, and attempts to provide trauma informed parenting education and non-offending parenting classes. found that, It therefore denied the motions for a finding of no reasonable

efforts.

¶13 At a review hearing in August 2020, the juvenile court again determined that DCS had made reasonable efforts to provide reunification services. The court identified the following services: a comprehensive medical and dental plan, supervised telephone contact with the paternal grandfather, monthly home visits, drug testing, therapeutic services, individual therapy, working with the VA to determine appropriate services, parenting classes, and assessments for visitation. ¶14 That same month, Kathryn filed a motion which Frederick joined for a clinical family assessment or, alternatively, a reunification assessment to be completed by Sherri Mikels-Romero, a licensed clinical social worker. 3 The juvenile court heard testimony on the motion over several days from October 2020 through February 2021. The court issued its under-advisement ruling in April 2021, denying the motion. The court explained that sessment provided the Court with the specific recommendation sought fear of their parents and why contact is not yet appropriate between the

parents and children.

¶15 At a review hearing in June 2021, the juvenile court found that DCS had again made reasonable efforts to effectuate reunification by evaluations of the parents. It also changed the case plan to permanent

guardianship. DCS subsequently filed a motion for appointment of Jesse as permanent guardian of C.C. and A.C. Thereafter, C.C. filed a motion for an in- before the contested guardianship trial. The court granted that request, and, during the interview, C.C. expressed his desire to remain in Tucson

entire C.C. explained toward him and ; that he was doing better in school, was eating healthier, and was well cared for with Jesse; and that Jesse gave him positive feedback and encouragement.

¶16 The juvenile court held a contested guardianship trial in October 2021. It subsequently issued its under-advisement ruling, granting the motion for appointment of permanent guardian and naming Jesse as permanent guardian of C. C. and A.C. The court incorporated into the ruling its June 2020 ruling on reasonable efforts and April 2021 ruling on a clinical family assessment. This appeal followed. 4

3 Mikels-Romero testified that she no longer contracted with DCS and was unsure whether she could work with the family. 4 Although Frederick and Kathryn filed separate notices, this court consolidated the appeals. Discussion

¶17 Frederick and Kathryn argue that DCS failed to provide reunification services and that the juvenile court misapplied § 8-871(A). We review questions of law de novo, In re Guardianship of Sleeth, 226 Ariz. 171, ¶ 12 (App. 2010), but we will not reverse an order for permanent guardianship unless it is clearly erroneous, Jennifer B. v. Ariz. Dep t of Econ. Sec., 189 Ariz. 553, 555 (App. 1997). When reviewing a guardianship order, we accept findings of fact unless reasonable evidence does not support them. Navajo Nation v. Dep t of Child Safety, 246 Ariz. 463, ¶ 9 (App. 2019).

¶18 The right to custo absolute. , 196 Ariz. 246, ¶¶ 11-12 (2000).

Under § 8-871(A), the juvenile court may establish a permanent guardianship if the guardianship is in the child s best interests and the following criteria are met:

1. The child has been adjudicated a dependent child . . . .

2. The child has been in the custody of the prospective permanent guardian for at least nine months . . . .

3. [DCS] has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds one or more of the following:

(a) Reunification efforts are not required by law.

(b) Reunification of the parent and child is not in the child s best interests because the parent is unwilling or unable to properly care for the child.

(c) The child is the subject of a pending dependency petition and there has been no adjudication of dependency. 4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child s best interests.

The party that files the motion for guardianship DCS in this case bears the burden of proof by clear and convincing evidence. A.R.S. § 8-872(G). consideration to the physical, mental and emotional needs and safety of the

§ 8-871(C); see also Ariz. R. P. Juv. Ct. 63(D)(3).

¶19 Of the four requirements in § 8-871(A), only the third is at issue here. Frederick and Kathryn first argue that DCS failed to provide reunification services; specifically, they contend DCS should have offered visitation and a clinical family assessment. 5

¶20 Although DCS service or to ensure that a parent participates in each service it offers, In re

Maricopa Cnty. Juv. Action No. JS-501904, 180 Ariz. 348, 353 (App. 1994), it is nd opportunity to , 193 Ariz. 185, ¶ 37 (App.

1999). DCS Do , 247 Ariz. 9, ¶ 46 (App. 2019)

(quoting Mary Ellen C., 193 Ariz. 185, ¶ 34), but need not undertake futile measures, Mary Ellen C., 193 Ariz. 185, ¶ 1.

¶21 DCS became involved in this case in April 2019. Whether DCS made reasonable efforts to provide reunification services was a continuing issue below. Early on, the juvenile court recognized that DCS was a finding of no reasonable efforts. But, as the court thereafter provided the

5 Frederick and Kathryn did not seek review of either the juvenile May 2019 order halting visitation or subsequent affirmations of that order or April 2021 denial of the request for a clinical family assessment. Challenging the orders before the court established a permanent guardianship would have saved time and preserved judicial resources. See , 186 Ariz. 405, 407 (App. 1996) guardianship action). We nonetheless address the arguments here. family a variety of services. As mentioned above, those services included: team meetings, a best-interests assessment, drug testing, psychological evaluations, therapy, counseling, parenting classes, an in-home safety analysis, a comprehensive medical and dental plan, and visitation with the paternal grandfather. by the record.

See Christina G. v. Ariz. Dep , 227 Ariz. 231,

¶¶ 14-15 (App. 2011) (reviewing record for reasonable evidence supporting s finding concerning services).

¶22 Frederick and Kathryn nevertheless contend that visitation juvenile court denied their or several years . . . without any legal

The court explained, however, that it would not order visitation until there was a therapeutic recommendation for it. That , and the time. We cannot say that the court abused its discretion. See In re Maricopa

Cnty. Juv. Action No. JD-5312, 178 Ariz. 372, 375 (App. 1994) Although a parent should be denied the right of visitation only under extraordinary circumstances, once that right is at issue, the trial court has broad discretion (citations omitted)).

¶23 T Desiree S. v. Department of Child Safety, 235 Ariz. 532 (App. 2014), is misplaced. There, a son was removed from his Id. ¶¶ 2-4. The mother successfully completed all the services offered by DCS except for family counseling, which the son refused to attend with her. Id. ¶ 9. The Id. ¶ 10. On appeal, this court determined that

because subjective belief, without more, cannot be the sole basis to determine that

. Id. ¶¶ 1, 11.

¶24 Here, in contrast, we are dealing with a permanent guardianship, which does not require a finding that that the parents will be unable to parent the children in the near future. Compare § 8-871(A), with A.R.S. § 8-533(B)(8). der of a permanent

with their parents. It was also based on the clinical recommendation of Dr. failure to understand how their actions caused [C.C.] and [A.C.] to not want to return to their care ¶25 Frederick and Kathryn further But

they cite no authority for their assertion, instead suggesting the court was

family assessment that supported visitation.

¶26 After a hearing spanning several days on the motion for a clinical family assessment, the juvenile court thoroughly explained in a written under-advisement ruling why it was denying the request. The court observed that the specific recommendation sought ild in requiring them to further discuss their allegations with yet another The court also questioned the methodology, explaining that the

proposed assessment in effect requires the children to have contact with their parents in order to determine whether such contact is . . . appropriate and in their best interests the first determination should be whether such contact is appropriate similarly indicated that it was important not to push C.C. and A.C. toward contact; instead, they recommended waiting until the children having a conversation about contact with their parents.

¶27 The juvenile court recognized the precise issue that Frederick and Kathryn bemoan: [T] o want to have contact with their parents is very much a factor in what the parents are capable of correctly recognized that it st give primary consideration to the physical, mental, and emotional needs of [A.C.] and See § 8-871(C); see also Ariz. R. P. Juv. Ct. 63(D)(3). s did not change during the course of the proceedings they remained fearful of their parents and adamant that they did not want contact.

¶28 Frederick and Kathryn next contend the juvenile court committed legal error ecause it failed to find any of the three reasons provided in § 8-871(A)(3) for terminating reunification services. But this argument was not raised below, and we could therefore deem it waived on appeal. See Logan B. v. Dep t of Child Safety, 244 Ariz. 532, ¶ 9 (App. 2018); see also Trantor v. Fredrikson, 179 Ariz. 299, 300 (1994) extraordinary circumstances, errors not raised in the trial court cannot be

In any event, the parents misconstrue the statute. ¶29 Section 8-871(A)(3) provides that, when establishing a made reasonable efforts to reunite the parent and child and further efforts would be unproductive. See In re Adam P., 201 Ariz. 289, ¶¶ 12-13 (App. 2001) (if as written). The statute then lists three exceptions that are only relevant if the court intends to waive the requirement for reasonable efforts.

¶30 Here, the juvenile court determined that DCS had made reasonable efforts to reunite the parents with their children by providing a variety of services, as detailed above. The court f]urther efforts therefore did not need to reach the three exceptions listed in § 8-871(A)(3).

¶31 Frederick and Kathryn nevertheless maintain,

They rely on Jessie D. v. Department of Child Safety, 251 Ariz. 574, ¶¶ 18-20

(2021), where the court determined preserve the family by providing services to assist parents in maintaining a

to provide reunification services in A.R.S. § 8-533(B)(4). But the parents also failed to raise this issue below, and again we could deem it waived. See Logan B., 244 Ariz. 532, ¶ 9; see also Trantor, 179 Ariz. at 300. Even assuming it were not waived, however, Jessie D. is distinguishable.

¶32 Jessie D. involved a termination of parental rights based on a § 8-533(B)(4). 251 Ariz. 574, ¶¶ 1, 5. Here, in contrast, we are concerned with a permanent guardianship under § 8-871(A). Unlike §

8-533(B)(4), § 8-871(A)(3) generally requires DCS to provide reasonable efforts to reunite the parent and child. In addition, the reasoning of Jessie D. does not apply here, where neither of the parents is incarcerated. The juvenile court therefore did not err in applying § 8-871(A)(3). See Guardianship of Sleeth, 226 Ariz. 171, ¶ 12.

¶33 Finally, Frederick and Kathryn But a court order vesting

permanent guardianship with an individual divests the birth . . . parent of legal custody of or guardianship for the child does not terminate the § 8-872(H) court can tailor the guardianship to the child s unique best interests. Timothy B. Child Safety, 252 Ariz. 470, ¶ 25 (2022). And the guardianship can be revoked upon a change in circumstances. A.R.S. § 8-873(A). Indeed, at the contested guardianship trial, the caseworker expressed hope that the children would want to resume contact with their parents as they grew older if contact .

Disposition

¶34 For the foregoing reasons, w order establishing a permanent guardianship for C.C. and A.C.