DIVISION ONE
FILED: 10/22/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANK P.,	)	1 CA-JV 13-0133
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
SABRINA H., DANIEL H., J.P.,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
	)	
Appellees.	)	
	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015AD201200070

The Honorable Richard Weiss, Judge

AFFIRMED

Mohave County Legal Defender's Office — Kingman
By Diane S. McCoy, Deputy Legal Defender
Attorneys for Appellant, Frank P.

Law Office of Michele Holden, P.L.L.C. — Kingman
By Michele Holden
Attorneys for Appellees, Sabrina H. and Daniel H.

K E S S L E R, Judge

¶1 Frank P. ("Father") appeals the juvenile court's order severing his parental rights to his son, J.P., for abandonment

pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2012).[1] For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 J.P. is the son of Father and Sabrina H. ("Mother").[2] Father and Mother have never been married to each other. Daniel H. is Mother's current husband.

¶3 Father, Mother, and J.P. moved from Massachusetts to Arizona in April 2005, when J.P. was approximately six months old. In September of that year, Mother kicked Father out of the house, apparently because he fell asleep while he was supposed to be watching J.P. and because Father "had four jobs in four months." Thereafter, Father returned to Massachusetts.

¶4 Father has maintained minimal contact with J.P. since returning to Massachusetts. Father has not seen J.P. since September 2005. Father offered to bring J.P. to Massachusetts via bus when J.P. was five years old, but Mother refused. Father has never visited J.P. since departing Arizona. Over the years, Father sent J.P. two gifts and no cards. Father has

[1] We cite to the current version of the statute when no revisions material to this decision have occurred.

[2] Mother has another child, C.H., fathered by a third party. The juvenile court severed the parental rights of C.H.'s natural father and granted Daniel H.'s petition to adopt C.H. by entering a decree of adoption. C.H.'s natural father did not appeal the juvenile court's decision severing his parental rights and is not a party to this appeal.

maintained infrequent telephone contact with J.P.,[3] which Father attributed to Mother's and Daniel H.'s interference. Mother testified that she deliberately declined to answer Father's phone calls "[a]bout eight or ten times." However, Father failed to take any legal action to secure visitation rights.

¶5 Father provided financial support for J.P. in the form of child support payments. He has relied on Social Security since he was five or six years old and currently receives Social Security Disability Insurance and Supplemental Security Income. Father has been paying child support since at least early 2007. Child support is garnished directly from his Social Security payments. Both Mother and Father testified, however, that Father is approximately $10,000 in arrears in child support, despite the lack of any record of an order awarding child support.

¶6 Daniel H.'s relationship with J.P. approximates a traditional father-son relationship. He attends J.P.'s football games, spends time with J.P. teaching him how to shoot, and treats J.P. as his "own child." J.P. also has a relationship with Daniel H.'s family.

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[3] The juvenile court did not determine exactly how many times Father attempted to speak with J.P. on the telephone. Instead, the court found that Father attempted to contact J.P. between five and sixty times over a period of six years. The court found that these attempts did not constitute "a substantial amount of contact."

¶7 In August 2012, Mother and Daniel H. filed a petition to sever Father's parental rights and a petition for adoption. The petition to sever alleged that Father abandoned his parental rights. The juvenile court ordered a social study to determine whether Daniel H. is fit and proper to adopt J.P. The study "recommended that the [petition to sever] be granted so that Daniel [H.] may adopt [J.P]." Father opposed the petition to sever his parental rights and the petition for adoption.

¶8 After Mother and Daniel H. filed a financial statement demonstrating financial need, the juvenile court appointed counsel to represent them in subsequent proceedings. The court also appointed counsel to represent Father and counsel to represent J.P. Thereafter, the Mohave County Attorney withdrew as counsel for Mother and Daniel H. Father never objected to the appointment of counsel for Mother and Daniel H., and never questioned their indigency. Nor did he object to the appointment of counsel to represent Father or J.P.

¶9 After a one-day trial, the juvenile court issued a minute entry granting Mother's and Daniel H.'s petition to sever Father's parental rights to J.P. On May 13, 2013, the juvenile court entered a final order severing Father's parental rights. The juvenile court found by clear and convincing evidence that Father abandoned J.P. as a result of his "minimal efforts to maintain any parental relationship with [J.P.]," his failure "to

maintain regular contact with [J.P.], including providing normal supervision," and his failure "to maintain a normal parental relationship with [J.P.] without just cause for a period of six months." Although the court found that Father paid child support, the court ultimately found that Father had failed to maintain regular contact with J.P. for a period of six years. In addition, the court found by a preponderance of the evidence that severance was in J.P.'s "best interests as it will free [J.P.] for adoption by his step-father."

¶10 Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A) (Supp. 2012).

STANDARD OF REVIEW

¶11 As the juvenile court is in the best position to weigh evidence and judge credibility, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). On review, we examine the facts in a light most favorable to sustaining the juvenile court's judgment. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000). We review issues of statutory construction de novo.

Kenneth B. v. Tina B., 226 Ariz. 33, 36, ¶ 12, 243 P.3d 636, 639 (App. 2010).

DISCUSSION

¶12 Father asserts that the juvenile court abused its discretion by: (1) exceeding its jurisdiction by appointing counsel to represent Mother and Daniel H.; (2) severing Father's parental rights on the basis of abandonment; and (3) finding that severance of Father's parental rights was in J.P.'s best interests. We address each argument in turn.

I. Appointment of Counsel

¶13 Father argues that the juvenile court exceeded its jurisdiction by appointing private counsel for Mother and Daniel H. Father maintains that A.R.S. § 8-127(A) (2007) affirmatively requires private parties, such as Mother and Daniel H., to retain private counsel when the county attorney withdraws from representing the private parties in contested adoption proceedings. Father contends that had Mother and Daniel H. been without court-appointed counsel, "it is highly likely they would have had cause to give a second thought to the severe approach they were taking as regards Father's and J.P.'s parent/child relationship, and some less severe middle ground might have been agreed upon."

¶14 Mother and Daniel H. argue that Father waived his objection to the appointment of private counsel to represent

them by failing to raise the issue before the juvenile court. Father concedes that the objection was not raised below.

¶15 We disagree with Father for several reasons. First, Father waived this issue when he failed to object to the appointment in the superior court. "As a general rule, a party cannot argue on appeal legal issues not raised below." *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, 160 P.3d 231, 234 n.5 (App. 2007). Nor does this case fall within the exception to the waiver rule permitting us to address an issue not raised below if "application of a legal principle, even if not raised below, would dispose of an action on appeal and correctly explain the law." *Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993). Father fails to show how the appointment of counsel for Mother and Daniel H. resulted in reversible error, especially considering that the juvenile court also appointed counsel for Father and for J.P. Father merely speculates that if the court had not appointed counsel for Mother and Daniel H., they might not have pursued the abandonment claim as vigorously as they did through counsel. There is no factual basis for that conclusion, nor any reason to believe that counsel for J.P. would not have strenuously sought termination of Father's parental rights.

¶16 Second, the superior court had authority to appoint counsel for all the parties pursuant to A.R.S. § 8-221(B) (Supp.

2012), which provides that if a parent "is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person." *See also Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, 260, ¶ 12, 77 P.3d 55, 58 (App. 2003) ("An indigent parent against whom a severance petition has been filed has the right to appointed counsel.") (citation and internal quotation marks omitted). Nothing in A.R.S. § 8-221(B) limits such right to petitions brought by the Arizona Department of Economic Security. Although Father relies on A.R.S. § 8-127(A) to support his argument that Mother and Daniel H. had to hire their own counsel,[4] that section is limited to appointment of counsel for the prospective adoptive parent in contested adoptions. Here, at the time of appeal no adoption had occurred and the issue before the juvenile court was the termination of Father's parental rights, not the adoption. Additionally, A.R.S. § 8-127(A) is limited to appointing counsel for the prospective adoptive parent, here Daniel H., but not for Mother, who petitioned for both the adoption and termination of Father's parental rights. Under these circumstances, we conclude that A.R.S. § 8-221(B) applies

[4] "If the petition [to adopt] is contested the county attorney, with the consent of the court, may withdraw from further representation of any party to the proceeding and the prospective adoptive parent shall employ counsel." A.R.S. § 8-127(A).

to ensure that all indigent parties involved in a parental termination matter are represented.

II. Abandonment

¶17 Father argues that A.R.S. § 8-531(1) (2007) requires the court to find that he failed both to provide reasonable support and to maintain regular contact with J.P. before abandonment can be established. Father maintains that the abandonment finding was therefore unwarranted because he consistently paid child support. He also argues that Mother and Daniel H. intentionally interfered with his ability to maintain regular contact with J.P., thus precluding a finding of abandonment based on a failure to maintain regular contact.

¶18 The juvenile court "may terminate a parent-child relationship if it finds one of the statutory grounds by clear and convincing evidence." *Kenneth B.*, 226 Ariz. at 36, ¶ 13, 243 P.3d at 639 (citing A.R.S § 8-537(B) (2007)). The parent-child relationship may be terminated when the "parent has abandoned the child." A.R.S. § 8-533(B)(1). "Abandonment" is defined as:

> [T]he failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six

> months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1).

¶19 The court uses an objective standard to determine abandonment, focusing on conduct rather than subjective intent. *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. "[I]n deciding whether a parent has abandoned a child . . . a court should consider each of the stated factors—whether a parent has provided 'reasonable support,' 'maintain[ed] regular contact with the child' and provided 'normal supervision.'" *Kenneth B.*, 226 Ariz. at 37, ¶ 18, 243 P.3d at 640 (quoting A.R.S. § 8-531(1)). Included within the concept of support is whether Father provided J.P. with gifts, clothes, cards, or food. *Id.* at ¶ 20.

¶20 The juvenile court considered all these factors when it ruled that Father abandoned J.P. by failing to maintain regular contact and provide normal supervision:

> Father has made but minimal efforts to maintain any parental relationship with [J.P.]. . . . Father has provided child support for [J.P. through] wage assignments. . . . Father has failed to maintain regular contact with [J.P.], including providing normal supervision. . . . Father has failed to maintain a normal parental relationship with [J.P.] without just cause for a period of six months. As a result of the foregoing findings, the Court finds and concludes by clear and convincing evidence . . . Father has abandoned [J.P.].

Construing the evidence in the light most favorable to affirm the juvenile court, the evidence supports abandonment. Father's reliance on his provision of support is misplaced. As the parties agreed, he had fallen behind in his support payments. Moreover, he failed to regularly provide gifts or cards to J.P.

¶21 Additionally, although Father did make some efforts to maintain regular contact with J.P., his efforts were limited to two gifts and sporadic attempts to speak with J.P. on the telephone. Although Father offered to bring J.P. to Massachusetts via bus, he never visited J.P. after departing Arizona. Because of the lack of significant contact between Father and J.P., there is no evidence that Father attempted to provide normal supervision. The juvenile court found that Father failed to provide regular contact and normal supervision. Based on the factual record before us, we cannot say that the juvenile court's findings were clearly erroneous.

¶22 Father argues that Mother and Daniel H. interfered with his ability to maintain regular contact with J.P. and provide normal supervision by preventing him from speaking with J.P. This court, however, has held that just cause was lacking when a father faced far more serious impediments to maintaining regular contact and providing normal supervision than those faced by Father in this case. *See, e.g.*, *Yuma Cnty. Juv. Ct. Action No. J-87-119*, 161 Ariz. 537, 539, 779 P.2d 1276, 1278

(App. 1989) ("The trial court did not abuse its discretion in finding that the father had abandoned his child. We conclude this in the face of the uncontroverted evidence that the mother severed all ties with her former husband and refused to tell him where she and the child were living."). Mother and Daniel H.'s conduct in this case was less severe. Moreover, at no time did Father seek to assert his parental rights through legal action. *See Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994) ("When, as in the present case, circumstances prevent the unwed father from exercising traditional methods of bonding with his child, he must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary."). Accordingly, Mother and Daniel H.'s conduct does not constitute just cause to excuse Father's failure to maintain regular contact, provide normal supervision, or enforce his parental rights.

¶23 Although Father expressed his desire to maintain custody of J.P., the court must look to conduct and not subjective intent. *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. Using this objective standard, we conclude that there was sufficient evidence to support the juvenile court's finding that Father abandoned J.P. by failing to maintain regular contact and provide normal supervision.

III. Best Interests

¶24 Father argues that the juvenile court abused its discretion by finding that severance of Father's parental rights was in J.P.'s best interests solely because of the existence of an adoptive plan. Father contends that severance of his parental rights provides no additional affirmative benefits to J.P. other than freeing him up for adoption by Daniel H. Additionally, Father maintains that continuation of his parental rights would not be detrimental to J.P.

¶25 Once abandonment has been established by clear and convincing evidence, "the court must find by a preponderance of the evidence that termination would be in the child's best interests" in order to sever parental rights. *Kenneth B.*, 226 Ariz. at 36, ¶ 13, 243 P.3d at 639. We will affirm a juvenile court's finding that severance of parental rights is in the best interests of the child unless it is clearly erroneous. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 449, ¶ 12, 153 P.3d 1074, 1078 (App. 2007).

¶26 To establish that severance of parental rights is in the child's best interests, the party seeking severance must prove that the child "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, 334, ¶ 6, 100 P.3d 943, 945 (App. 2004). "The existence of

a current adoptive plan is one well-recognized example of such a benefit." *Id.* "In combination, the existence of a statutory ground for severance and the immediate availability of a suitable adoptive placement for the [child] frequently are sufficient to support a severance order." *Id.* at 335, ¶ 8, 100 P.3d at 946.

¶27 The juvenile court found that "[t]he father that has established and created emotional bonds with [J.P.] is [Daniel H.]." As such, the juvenile court found "by the preponderance of the evidence that severance of the parent-child relationship is in [J.P.'s] best interests as it will free [J.P.] for adoption by [Daniel H.]."

¶28 Here, the juvenile court's finding that severance of Father's parental rights is in J.P.'s best interests was based on the affirmative benefit of adoption by Daniel H. The juvenile court did not find any detrimental consequences of allowing Father to maintain parental rights. However, the availability of a suitable adoptive placement combined with the existence of a statutory ground for severance of parental rights is sufficient to support a severance order. *Oscar O.*, 209 Ariz. at 335, ¶ 8, 100 P.3d at 946. Accordingly, we conclude that the evidence is sufficient to support the juvenile court's finding that severance is in J.P.'s best interests.

CONCLUSION

¶29 For the foregoing reasons, we affirm the juvenile court's severance of Father's parental rights to J.P.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Presiding Judge

/s/
MICHAEL J. BROWN, Judge