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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE
LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

M.P. AND SANDRA G., *Appellants,*

v.

NATHAN P., *Appellee.*

No. 1 CA-JV 14-0057
FILED 11-20-14

Appeal from the Superior Court in Maricopa County
No. JS12415
The Honorable AnnieLaurie Van Wie, Commissioner

AFFIRMED

COUNSEL

Thomas Vierling, Phoenix
Counsel for Appellant Mother

Alison Stavris, Scottsdale
Counsel for Guardian ad Litem

Lincoln Green, Jr., Phoenix
Counsel for Appellee

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 The mother, Sandra G. and the Guardian ad Litem for the child M.P., both appeal the denial of severance of Father, Nathan P.'s parental rights to M.P. Appellants argue the trial court erred in finding Father had not abandoned M.P., and that the ruling denying termination is not in the child's best interest.¹ For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother and Father are the biological parents of M.P., born May 3, 2009. At the time of birth, Mother and Father were in a relationship together, and this relationship continued until December 2010.

¶3 After Mother and Father ended their relationship, Father saw the child occasionally. This included a visit Christmas morning 2010 and an overnight stay in January 2011, as well as some phone calls. Mother testified that Father's last in-person contact with M.P. was on June 19, 2011. Mother also stated that since June 19, 2011, Father had not taken any other steps to establish a relationship with the child other than emails. Father testified the last time he saw M.P. in person was in February or March of 2013.

¶4 In February 2011, M.P. was introduced to Joshua G. ("step-father"), and Mother, step-father, and M.P. began living together in April 2011. Mother and step-father were married in September 2011. The child refers to the step-father as "Dad," and Mother testified that step-father is the only father the child has ever known.

¹ Father, represented by court-appointed counsel, did not file an answering brief. Acting in our discretion, we do not consider the failure to file an answering brief to be a confession of error, especially because we conclude the trial court correctly applied the law in this case. *Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994).

¶5 Mother testified she had not received any financial support for the benefit of the child from Father since they separated in December 2010, including any costs of daycare. She also testified Father had not followed through on having his health insurance cover hospitalization for M.P., and had never paid for or asked about any of M.P.'s health care visits. While she conceded Father had sent gifts and emails to the child, including Christmas gifts in 2012, M.P. was told the 2012 Christmas presents were from Santa, not Father. Father testified he had been the primary caregiver for M.P. prior to the separation. When Father requested that Mother tell M.P. he said happy birthday, Mother simply told M.P. that "someone that was very close to her said to say happy birthday." Mother also testified she had never allowed Father to have a visit alone with the child without Mother or step-father present. Father testified he had offered to help pay daycare expenses once his employment situation enabled him to if Mother would tell him where M.P. was in daycare, but Mother refused to do so.

¶6 Father claimed he offered Mother money for support, but both money and presents for M.P. had been refused by Mother. Father testified he would get gifts for the child every chance he had, and that the gifts were often clothes. However, Mother had repeatedly discouraged him from getting gifts for M.P. by not telling him what M.P. might want and he often had to get the gifts to M.P. through Mother's cousin. Father also testified he had offered Mother his insurance card, but Mother had refused his offer saying she had coverage through AHCCCS. Father introduced numerous emails with Mother, many asking how M.P. was doing, expressing his love for M.P. and asking to see M.P. Nearly all the emails regarding M.P. were sent from Father to Mother, and Mother almost never initiated contact with Father regarding M.P. Father testified that because of the anger between them and Mother's refusal to permit access to M.P., he began to ask to see M.P. less often. While Father had a gap in emails to Mother about M.P. for a six month period in 2012, Father testified he had been hospitalized for a portion of that time. Father also testified that for long periods of time he did not know where Mother and M.P. lived and did not have a telephone number for Mother, although Mother did at one time provide him with one telephone number.

¶7 It was uncontested that after one sleepover at Father's apartment early in 2011, Mother forbid Father to have any overnight visits with M.P. because of the presence of a dog in the apartment which M.P. was allegedly allergic to, despite Father having offered to keep the dog elsewhere and M.P.'s enjoyment of the dog.

¶8 Father testified that until the fall of 2013, he had financial problems, but he was currently working part-time on an oil rig in Colorado, earning approximately \$68,000 per year and had a big home in which he had reserved a room for M.P. Father also testified he had contemplated filing a custody action in family court in 2011 to obtain access to M.P., but deferred doing so because he thought he could not afford the cost. Father did file a custody action in 2013, but did not prosecute it because he was told by court staff that such an action could not proceed until Mother's severance action was over.

¶9 Step-father believed M.P. having a relationship with Father would benefit the child. Step-father also testified his relationship with M.P. would not change if severance were denied. After filing the severance action in 2013, Mother asked Father to agree to the severance so that Step-father could adopt M.P., stating that if severance were granted, Father could still have a relationship with M.P. Father testified that he did not feel having his rights terminated was in M.P.'s best interests, because he loves his daughter and wants to be supportive. Father acknowledged "not being there" for the child, but he asserted that financial issues that had contributed to his absence were resolved by his new job.

¶10 The juvenile court denied Mother's petition to terminate Father's parental rights. The court concluded there were no credibility issues, but Mother had not met her burden to prove abandonment or that severance was in M.P.'s best interest. More specifically, the court found Father had made repeated, although sometimes sporadic, attempts to have a relationship with M.P., and had repeatedly attempted to see M.P. and get gifts and cards, but Mother had put conditions to discourage such meetings and gifts and encouraged Father to stay out of their lives because she believed neither she nor M.P. needed him.

¶11 The court also noted Father had a lot to offer M.P., that the addition of Father back into M.P.'s life would not change her relationship with step-father but only give the child one more loving parent, and that Mother had expressed her willingness to let Father have a relationship with M.P. if he agreed to the severance, indicating that having such a relationship would not harm the child. The court also found Mother had conceded M.P. was very intelligent and adaptive, concluding that M.P. would adjust to having Father back in her life. Finally, the court noted if after giving Father a chance to re-establish his relationship with M.P., he either failed to do so or such a relationship was causing harm to the child, Mother could again seek to sever the relationship.

¶12 Appellants timely appealed. *See* Ariz. R.P. Juv. Ct. 104(A). We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2012).

ISSUES AND STANDARD OF REVIEW

¶13 Appellants argue the juvenile court erred in concluding they had not met their burden of showing Father had abandoned M.P. and that severance was not in M.P.'s best interest. In addition, Mother argues the court erred in applying a new exception to the standard for abandonment when one parent places non-legal impediments to the other parent's attempts to see the child.

¶14 Mother had the burden in the juvenile court to prove by clear and convincing evidence that Father had abandoned M.P. and to prove by a preponderance of the evidence that severance of Father's relationship with the child would be in M.P.'s best interest. A.R.S. § 8-537(B), *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005). On appeal, we do not reweigh evidence, but defer to the trial court's findings. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998). "Therefore, we look to the record to determine whether reasonable evidence supported the juvenile court's order." *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 550, ¶ 10, 225 P.3d 604, 607 (App. 2010). Questions of abandonment are questions of fact for resolution by the trial court; unless there is no reasonable evidence to support the court's finding of facts, appellate courts must accept them. *In re Appeal in Yuma Cnty. Juvenile Court Action*, 161 Ariz. 537, 539, 779 P.2d 1276, 1278 (App. 1989). We will affirm a trial court's findings where there is "any reasonable evidence in the record that justifies the decision." *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93-94, ¶ 4, 210 P.3d 1263, 1264-65 (App. 2009) (quoting *Stevenson v. Stevenson*, 132 Ariz. 44, 46, 643 P.2d 1014, 1016 (1982)). We review de novo interpretations and application of the law to the facts. *Ariz. Dep't of Econ. Sec. v. Ciana H.*, 191 Ariz. 339, 341, ¶ 11, 955 P.2d 977, 979 (App. 1998).

DISCUSSION

¶15 A.R.S. § 8-533(B)(1) provides that a court may terminate a parent's rights to a child based on abandonment. Abandonment is defined in A.R.S. § 8-531(1)² as:

² A.R.S. § 8-546(1), which the decision below discusses, was repealed and renumbered as A.R.S. § 8-531(1), effective May 29, 2014. We cite to the

the 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.

This definition applies to all sections within the chapter. *In re Appeal in Pima Cnty. Juvenile Severance Action No. S-114487*, 179 Ariz. 86, 95, 876 P.2d 1121, 1130 (1994). The supreme court held that “abandonment cannot turn on a bright line formula developed to determine whether a parent abandoned an existing relationship,” but that the key is the statute defining abandonment, which should be applied in common-sense terms. *Id.* at 96, 876 P.2d at 1131. Unlike when the court orders the termination of a parent-child relationship, “the court is not required to make findings when denying a motion to terminate the parent-child relationship.” *Matthew L.*, 223 Ariz. at 549–50, ¶ 10, 225 P.3d at 606–07.

¶16 The Arizona Supreme Court held

[a]bandonment is measured not by a parent's subjective intent, but by the parent's conduct: the statute asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship.

Michael J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, 249–50, 995 P.2d 682, 685–86 (2000). See also *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 450, ¶ 15, 153 P.3d 1074, 1079 (App. 2007) (noting severance involves an “individualized, fact specific inquiry”). There is reasonable evidence in the record to support the court's conclusion that Father did not abandon M.P. While Mother asserts Father failed to provide reasonable support, and points to testimony that Father had not given her any money for food, housing, education or daycare, and medical expenses for the child, Father testified that once his employment had improved, he repeatedly offered to give Mother money for daycare and had offered her coverage to pay a

current versions of statutes when no changes material to this decision have since occurred.

hospitalization expense, but Mother had refused to tell him where the daycare was and had refused the offer for insurance coverage.

¶17 Mother also argues Father has failed to maintain regular contact and make more than minimal efforts to communicate with the child. While the record is clear Father's attempts to communicate with M.P. were at times sporadic, Father made repeated attempts to see and learn about M.P. and testified a partial reason for his decreasing efforts over time was due to Mother's unwillingness to allow the child to have unsupervised visits with him and visitation had to occur on Mother's terms. The record was also clear since he and Mother had separated, he made repeated attempts to give M.P. gifts and cards. Reasonable evidence supports the court's conclusion that Mother had, by her own actions and, to a lesser degree, by the actions of step-father, prohibited regular, meaningful, ongoing contact between Father and the child. While Mother may have justified such conduct on her concern for stability in M.P.'s life, it does not take away from Father's continued efforts to maintain a relationship with his child.

¶18 Appellants also argue Father failed to act diligently in pursuing a family court action to protect his rights to continue his relationship with M.P. However, Father provided evidence that he had delayed filing a family court action because of the expense involved and was later told by court officials after he filed the action in 2013 that his custody action could not be prosecuted until after the severance action was completed.³

¶19 Mother argues the juvenile court also erroneously relied upon *Calvin B. v. Brittany B.*, 232 Ariz. 292, 304 P.3d 1115 (App. 2013) to create an exception to abandonment when a parent places impediments in the way of another parent having access and a continued relationship with his or

³ Mother cites to *Michael J.* to support her contention that Father did not take all reasonable steps to protect his rights to the child. However, the facts of *Michael J.* are easily distinguishable, as the father in *Michael J.* "sent no cards, no gifts, no letters; he made no telephone calls to hear his son's voice or to allow his son to hear his father; he neither requested pictures of [his child] nor provided his own pictures for his son to see. He made no attempt to learn whether [his son] was thriving or languishing." *Michael J.*, 196 Ariz. at 251, 995 P.2d at 687. While admittedly sporadic, Father made all of these efforts and more in an attempt to create a relationship with M.P.

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her child. Mother contends that *Calvin B.* is limited to a parent placing legal impediments, such as an order of protection, in the way of the other parent.

¶20 We think Mother reads *Calvin B.* too narrowly. While that case did involve an order of protection to limit access by one parent to the child, we also held “[a] parent may not restrict the other parent from interacting with their child and then petition to terminate the latter's rights for abandonment.” *Id.* at 297, ¶ 21, 304 P.3d at 1120. As the juvenile court noted here, a parent can take effective action to prevent another parent from having reasonable access to and ability to interact with a child short of placing legal impediments to such a continued relationship. Additionally, in *Calvin B.*, the court noted while the father was not always diligent in pursuing his parental rights and fulfilling his corresponding parental responsibilities, the father actively sought more involvement with the child than the mother would allow. *Id.* at 297, ¶ 21–25, 304 P.3d at 1120. The court made similar findings here. And while the parent in *Calvin B.* had taken legal steps to protect his rights, here Father had taken some steps to obtain legal visitation with M.P. It was for the juvenile court to weigh those efforts to determine if they were sufficient.

¶21 Mother also argues the juvenile court erred in finding severance was not in the best interests of the child. Although our resolution of the abandonment issue renders the best interests issue moot, we nevertheless address it to provide guidance if Mother again seeks severance in a future proceeding.

¶22 In finding whether a severance would be in the best interests of the child, the court will look to see “how the child would benefit from a severance or be harmed by the continuation of the relationship.” *Maricopa Cnty. Juvenile Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (App. 1990). Mother contends the child would be harmed by any relationship with Father. She testified “[i]t would be emotionally damaging to her to know now . . . that the life that she has is not the way it is. And for her to know who he is and for him not to be around . . . would be very difficult for her.” Mother testified M.P. would benefit from severance of Father’s rights by continuing to have a stable home and not to have any “interruptions or emotional things to go through at the age of four.”

¶23 We find no abuse of discretion. Mother herself implied a relationship between M.P. and Father was appropriate when she told Father that he could have a continued relationship if he did not contest the severance. And in a private severance action in which a child has been living and will continue to live with a parent, the availability of adoption

by a step-parent does not necessarily establish severance is in the child's best interests. *See Jose M. v. Eleanor J.*, 234 Ariz. 13, 17-18, ¶ 23, 316 P.2d 602, 606-07 (App. 2014) (noting that a mother's intent to marry her fiancé and have her fiancé adopt her child, without more, did not establish an increase in stability and permanency for the child to the degree necessary to demonstrate a benefit warranting severance of the child's father's parental rights). As to Mother's concerns about reintroduction to Father being detrimental and confusing to the child, the court noted such reintroductions can be accomplished with the aid of counselors in family court. While there were competing interests that showed that severance might be beneficial to M.P., the juvenile court did not abuse its discretion by concluding that severance was not in M.P.'s overall best interests.

CONCLUSION

¶24 There is no threshold level for abandonment that compels severance. *Christy C.*, 214 Ariz. at 450, ¶ 15, 153 P.3d at 1079. Since there is substantial reasonable evidence in the record to support the juvenile court's decision, we affirm.



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