IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ANDREW D., *Appellant*,

v.

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

No. 1 CA-JV 16-0471
FILED 5-4-2017

Appeal from the Superior Court in Maricopa County
No. JD31486
The Honorable Lisa Daniel Flores, Judge

REVERSED AND REMANDED

COUNSEL

Robert D. Rosanelli Attorney at Law, Phoenix
By Robert D. Rosanelli
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Amber E. Pershon
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Andrew D. (father) appeals the juvenile court's order severing his parental rights to his son, A.S. Father asserts there was insufficient evidence he abandoned A.S. For the following reasons, we agree with father and reverse the severance.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father is the biological parent of A.S. Mother—not a party to this appeal—gave birth to A.S. on September 8, 2015. Father and mother are married. Both mother and A.S. tested positive for heroin and cocaine at the time of A.S.'s birth. Father was not present at the birth because he had been incarcerated for a probation violation. After A.S.'s birth, mother informed father that A.S. was fathered by another man.

¶3 A.S. remained in the hospital, displaying severe withdrawal symptoms from the drugs in his system. In October 2015, when A.S. was discharged from the hospital, the Department of Child Safety (DCS) took custody of A.S. and filed a petition to have him declared dependent as to father. Father testified that he first visited A.S., without contacting DCS, about two months after his release from incarceration in January 2016.[1] Father did not send A.S. any cards or letters while he was incarcerated.

¶4 DCS contacted father in March 2016 after he was alleged to be A.S.'s legal father, although paternity had not yet been determined. Father did not follow-up with DCS to coordinate visits or other services through the agency. In April 2016, the juvenile court found A.S. dependent as to father and set concurrent case plans of family reunification and severance and adoption. In May 2016, father's paternity was confirmed after DNA testing established the other man was not A.S.'s biological father. The same month, the court changed the case plan to severance and adoption, and DCS

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[1] The record is inconsistent as to father's release date. The record is also inconsistent as to when father first visited A.S.

moved to terminate father's parental rights to A.S on the ground of abandonment.

¶5 At the severance hearing, father testified that he continued to visit A.S. directly through A.S.'s placement and provided non-financial support, without contacting DCS. The placement permitted and encouraged father to visit A.S. Father testified that it was difficult for him to visit A.S. often because A.S.'s placement was far from where he resided, during all relevant times, and he did not consistently have transportation. In November 2016, the juvenile court terminated father's parental rights on DCS's asserted abandonment ground. Father timely appealed. This court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 8-235(A) (2014), 12-120.21(A)(1) (2016), and -2101(A)(1) (2016).[2]

DISCUSSION

¶6 The state can terminate parental rights under the circumstances and procedures specified by A.R.S. § 8-533. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12, 995 P.2d 682, 684-85 (2000) (internal quotation and citation omitted). Under that statute, a juvenile court must find, by clear and convincing evidence, at least one statutory basis for termination to justify termination of parental rights. *Id.* at 249, ¶ 12, 995 P.2d at 685 (citing A.R.S. § 8-533(B)). A parent's abandonment of a child is one of the enumerated grounds by which the state may terminate a parent's rights to a child. *See* A.R.S. § 8-533(B)(1). The court must also find by preponderance of the evidence that the termination is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶7 On appeal, father argues only that the evidence was insufficient to support severance of his parental rights on the asserted ground of abandonment. He does not contest the juvenile court's best interests finding. Accordingly, we solely address the issue of abandonment, and ultimately reverse the trial court's order terminating father's parental rights to A.S.

¶8 "[T]he juvenile court was in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *Matter of Pima Cty. Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). Thus, we do not

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[2] We cite to the current version of the relevant statutes, unless revisions material to this decision have occurred.

reweigh the evidence; we determine only whether there is evidence to support the juvenile court's ruling. *Maricopa Cty. Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996).

¶9 Section 8-531(1) defines abandonment to mean:

> 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.

There is no bright line formula for determining whether a parent has abandoned an existing relationship or failed to establish a relationship with a child. *See In re Pima Cty. Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (1980) ("The term 'abandon' must be somewhat elastic . . . ."). Whether a parent has abandoned his child is a "question[] of fact" for the trial court to resolve and is determined by the parent's conduct. *Michael J.*, 196 Ariz. at 249-50, ¶¶ 18, 20, 995 P.2d at 685-86. "What constitutes reasonable support, regular contact, and normal supervision varies from case to case." *In re Pima Cty. Juv.Action No. S-114487*, 179 Ariz. 86, 96, 876 P.2d 1121, 1131 (1994).

¶10 The evidence is insufficient to support a "clear and convincing" finding of abandonment. The clear and convincing evidence standard that must be met for establishing a ground of abandonment, *see supra* ¶ 6, requires a showing that the grounds for termination are "highly probable or reasonably certain." *See Kent K.*, 210 Ariz. at 285, ¶ 25, 110 P.3d 1013, 1019 (quotation and citation omitted). Probable means "having more evidence for than against, or evidence that inclines the mind to belief but leaves some room for doubt." The Random House Dictionary of the English Language (2d. ed. Unbridged 1987). The preceding word "highly" in the standard demands that the required probability be exceedingly so. "Reasonably certain" similarly suggests that the evidence warrants the conclusion that abandonment is most likely to be the natural result of father's objective conduct. We cannot conclude that the evidence before the trial court reached this level of certainty.

¶11 While the right to custody of one's child is not absolute, that right is nonetheless fundamental. *Michael J*, 196 Ariz. at 248-49, ¶¶ 11-12,

995 P.2d at 684-85. Therefore, termination of parental rights is generally not favored and "should be considered only as a last resort." *Matter of Appeal in Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990) (citation omitted); *see also id.* at 4-5, 804 P.2d at 733-34 (citing *Dep't of Econ. Sec. v. Mahoney,* 24 Ariz. App. 534, 537, 540 P.2d 153, 156 (1975) (termination of the parent-child relationship should not be considered a panacea but should be resorted to only when concerted efforts to preserve the relationship fails); *Anonymous v. Anonymous,* 25 Ariz. App. 10, 11, 540 P.2d 741, 742 (1975) (severance is a serious matter and courts should "bend over backwards," if possible, to maintain the natural ties of birth); *In re Adoption of Hyatt,* 24 Ariz. App. 170, 176, 536 P.2d 1062, 1068 (1975) (the state and its courts should do everything in their power to keep the family together and not destroy it); *Matter of Appeal in Cochise Cty. Juv. Action No. 5666–J,* 133 Ariz. 157, 159, 650 P.2d 459, 461 (1982) (the permanency of termination dictates that it be resorted to in only the most extreme cases)).

¶12 Here, it is clear father did not abandon A.S. in the first instance. DCS took the child while father was incarcerated after mother had told father that he was not A.S.'s biological father. Thus, *S-114487*'s directive that, absent traditional methods of bonding, a father "must act persistently to establish the relationship [with his child] however possible and must vigorously assert his legal rights to the extent necessary" is not directly applicable to this case. 179 Ariz. at 97, 876 P.2d at 1132 (citation omitted). It is logical that based on the information father had received from mother, he would believe A.S. was not his child.

¶13 Likewise, *Michael J.*'s indication that the ground of abandonment may be supported by showing that an incarcerated father failed to make inquiries about his child and failed to send letters or cards to his child carry very little wait in the context of this case. *See* 196 Ariz. at 251, ¶ 24, 995 P.2d at 687. *Michael J.* does not speak to a case where paternity had not been established. Therefore, the fact that here father did not send letters or gifts from prison to a child he was informed was not his does not tend toward a conclusion of abandonment. It is also hard to understand how an individual's bond to a child could be quantified by the number of letters and/or cards the individual sends to the child—who is of an age where he cannot read or fully understand what is being read—over a time-period. Furthermore, the requirement that a father "must act to establish his parent-child relationship" most convincingly applies to unwedded fathers—"because the unwed father has no immediate and obvious legal ties to the child" absent a determined biological connection. *S-114487*, 179 Ariz. at 96, 876 P.2d at 1131. *But cf.* 196 Ariz. at 251, ¶ 25, 995 P.2d at 687 (citation omitted) (where the father was married to the child's mother,

stating that "[t]he burden as a parent rests with the parent, who should assert his legal rights at the first and every opportunity").

¶14 The record also indicates that father first visited A.S. before his paternity was confirmed. Thus, father was willing to assume the role of father to a child he was told was not his. To this point, at the severance hearing father testified in response to opposing counsel's questions:

> Q Sir, if your testimony is that you didn't really view this boy as yours until August, why did you go visit him in January with your wife?
>
> A Because something like that I want to see for myself and at the same time I'm her husband. I ain't divorce her. So whatever comes with it I was going to step up and take responsibility as a man. So—

This is hardly the objective response of a man who would abandon a child.

¶15 We also disagree with the trial court's conclusion that father's efforts amounted to a failure to "maintain a normal parental relationship with the child without just cause for more than six months." While the case law does not set out what amounts to "just cause;" case law advises that "[w]hat constitutes reasonable support, regular contact, and normal supervision varies from case to case." *S-114487*, 179 Ariz. at 96, 876 P.2d at 1131.

¶16 Here, father testified that he visited A.S. "more than five," but "less than ten" times between January 2016 and November 2016. He stated that he was unable to visit more often because of the distance between where he resided and A.S.'s placement. Instead, father stated that he used alternative means of contacting placement about A.S.—including phone calls, instant message, and Facebook. The placement also acknowledged sending father video-clippings of A.S. Father's testimony in this regard is not discredited because DCS was not privy to all these exchanges.

¶17 It was also reasonable that father would refrain from directly providing the placement with money for A.S.'s financial support where after asking about what A.S. needed, the placement responded "just come. He needs you all." Instead of providing money, father brought diapers and wipes to his visits, and two outfits and toys he gave to A.S. for his second birthday in September 2016.

¶18 Perhaps the most essential consideration in this severance case is that there is a fundamental constitutional right involved. This fundamental right "does not evaporate simply because" the court does not consider father a model parent, or because the state has custody of A.S. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). It is noteworthy that A.S. was not taken into DCS's care due to any act or omission by father harming or hostile to A.S. "[U]ntil the state proves parental unfitness, the child and his parent[] share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. We conclude this record does not support a basis for a "clear and convincing" finding of abandonment to render the conclusion that father has demonstrated he is an unfit parent.

CONCLUSION

¶19 For the foregoing reasons, we reverse the juvenile court's termination of father's parental rights to A.S. pursuant to A.R.S. § 8-531(1). We remand the case for further proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
FILED: AA