

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID L.,) No. 1 CA-JV 09-0188
)
Appellant,) DEPARTMENT C
)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
) 103 (G) Ariz. R.P. Juv.
ARIZONA DEPARTMENT OF ECONOMIC) Ct.; Rule 28 ARCAP)
SECURITY, J.L., AND R.L.,)
)
Appellees.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD 505324

The Honorable Brian K. Ishikawa, Judge

AFFIRMED

Steven Clark, P.C.
By Steven G. Clark
Attorney for Appellant

Phoenix

Terry Goddard, Arizona Attorney General
By Kathleen Skinner, Assistant Attorney General
Attorneys for Appellees

Mesa

B R O W N, Judge

¶1 David L. ("Father") appeals the juvenile court's order terminating his parental rights to his daughter, R.L., and his son, J.L. ("children").¹ For the following reasons, we affirm.

BACKGROUND

¶2 Father and Robyn L. ("Mother") are the biological parents of R.L. and J.L., who were born in April 1997 and January 2001 respectively.² On October 5, 2004, Child Protective Services ("CPS") received a report that Father had been leaving the children unsupervised at a motel and that J.L., age three at the time, was in the pool area alone. On October 29, after CPS visited with Father and/or the children several times, the children were taken into the temporary custody of CPS due to concerns about Father neglecting the children's basic needs for food, clothing, and electricity, leaving them unsupervised without an emergency contact, and failing to ensure their attendance at school. On November 3, the Arizona Department of Economic Security ("ADES") filed a petition alleging that the children were dependent as to Father. The petition was voluntarily dismissed in February 2005 after Father demonstrated

¹ On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

² Father and Mother also have an older child, T.L., born in October 1993. T.L. is subject to the juvenile court's dependency orders in this case but is not a party to this appeal. Mother is also not a party to this appeal.

sufficient progress toward providing for the children, was clean in his urinalysis testing, and ADES was no longer concerned about his ability to parent.

¶13 In June 2005, a homeless shelter called police because Father had been leaving the children alone without making arrangements for their care and supervision.³ The police contacted CPS, which again took the children into temporary custody due to Father's lack of stable housing and lack of appropriate supervision of his children. ADES filed a second dependency petition. Father denied the allegations of the petition but submitted the issue to the juvenile court. The court found the children dependent as to Father based on his inability or unwillingness to care for the physical and emotional needs of the children and ordered removal of the children from the home. The court also found the plan for family reunification was appropriate.

¶14 In furtherance of the family reunification plan, ADES offered various services to Father, including a psychological evaluation, parent-aide services, parenting classes, counseling, bus passes and other transportation assistance, counseling for the children, visitation with the children, day care assistance, health care for the children, and a housing subsidy. Family

³ At times Father left the children in the care of their older brother, T.L.; however, this violated the shelter's policy.

reunification was achieved to the satisfaction of ADES and the children were returned to Father. The dependency remained open, however, as an in-home dependency, and ADES continued to provide services to Father and the children. Over the next year and a half, the children were removed from and placed back in Father's care several times.⁴ Throughout this time, Father participated in various services offered by ADES, but was unable to prove that he could maintain dependable housing or stable employment. He also missed appointments with the family reunification team, was not compliant with parent-aide services, and disregarded CPS' request that he stay in contact if he was evicted from his residence. After the removal of the children from Father's care in October 2007, the children have remained in foster care.

¶15 In February 2009, a CPS case manager recommended that the family reunification plan be changed to severance and adoption. She believed that the children needed a permanent home and that providing Father with additional time to participate in reunification services would be "ineffectual and detrimental to the children." Although Father had made positive strides, he had not been able to maintain a stable home environment for himself or the children without the intervention of CPS. The caseworker also noted that Father had not provided

⁴ During the dependency proceedings, the children were removed from Father's care on five different occasions.

proof of income for at least twelve months and had failed to provide rental receipts for at least six months. ADES then filed a motion for termination of Father's parental rights pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(2) (Supp. 2009) (neglect), 8-533(B)(8)(c) (Supp. 2009) (fifteen months' out-of-home placement).⁵

¶16 The juvenile court held a contested severance hearing. ADES presented the testimony of the case manager and a CPS supervisor. Father did not present any evidence but he did make a brief unsworn statement at the conclusion of the hearing. The court took the matter under advisement and later ruled that ADES had made a diligent effort to provide reunification services and had proven by clear and convincing evidence the grounds for severance based on neglect and fifteen months' out-of-home placement. The court also determined termination was in the children's best interests. Father filed a timely appeal.

DISCUSSION

¶17 An order terminating parental rights must be supported by (1) clear and convincing evidence showing at least one statutory ground for severance; and (2) a preponderance of the evidence establishing that severance is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz.

⁵ We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We "will not disturb the juvenile court's order severing parental rights unless [the court's] factual findings are clearly erroneous, that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). We consider the facts in the light most favorable to accepting the juvenile court's findings. *Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994).

A. Neglect

¶8 Father argues that the juvenile court's decision to sever his parental rights was clearly erroneous because it was based on "facts not found in evidence" or "contradictory to evidence." He further contends that the court relied upon "stale and incomplete information and testimony."

¶9 As an initial matter, Father has not made any specific arguments on appeal that the court erred in severing his rights based on neglect under A.R.S. § 8-533(B)(2), which could constitute abandonment and waiver of his claim on that basis. See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."). Considering the

importance of Father's rights at stake here, in our discretion, we decide this appeal on its merits based on our own review of the record. See *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (recognizing that courts prefer to decide each case upon its merits rather than dismissing on procedural grounds).

¶10 Construing Father's opening brief as raising a challenge to the court's order finding severance appropriate based on neglect, we disagree that the court's order is clearly erroneous. The juvenile court could properly sever Father's rights upon a finding of neglect if: (1) Father was unwilling or unable to provide the children with supervision, food, clothing, shelter or medical care; and (2) his inability or unwillingness causes unreasonable risk of harm to the children's health or welfare. A.R.S. § 8-533(B)(2); A.R.S. § 8-201(22) (Supp. 2009). Here, the court found that Father had been unable to provide the children with stable supervision, food or clothing, and, the children had been in the care of ADES because of Father's inability to "provide for [their] basic needs and to maintain stable housing and employment." The court further determined that Father had been unable to provide verification of stable employment despite repeated requests from the case managers throughout the case. The court also found that Father "has moved his residence continuously since the duration of this

case and has moved approximately three times⁶ in the past seventeen months." Based on these factual findings, the court determined that Father had neglected the children, causing a substantial risk of harm to their health and welfare.

¶11 We conclude there is sufficient evidence in the record to support the court's order regarding neglect of the children. Father repeatedly left the children unsupervised. In 2004, CPS began investigating Father when J.L. was discovered roaming around a hotel pool unsupervised at three years of age. In 2005, Father was cited six times by a homeless shelter for leaving the children unsupervised. In 2006, CPS was notified by the police that T.L. and J.L. were alone in a motel room.⁷ Father consistently ignored CPS' requests that he find adequate supervision for the children.

¶12 Father was also unable to provide for the children's basic needs. As a result of his continual unemployment, Father has been unable to maintain stable housing. In 2006, R.L. told police that she had not attended school for over a month, and that they had slept in a U-Haul for a couple of nights. At times CPS found that the children lacked a sufficient amount of food, clothing, and that they looked "dirty and disheveled." As

⁶ Testimony from the caseworker indicates that Father moved five times in the past seventeen months.

⁷ Father had been arrested for possession of a stolen vehicle, which was a U-Haul that had not been returned on time.

of the day of the severance hearing, Father remained unable to provide proof of employment.

¶13 Father contends that he maintained housing throughout the dependency, pointing to testimony from the case manager. He also asserts that he provided rent receipts and proof of income. The record, however, indicates that the case manager merely acknowledged that Father had places to live, such as shelters or apartments. As to the rent receipts, her testimony confirmed that receipts had been provided when Mother was released from prison; however, she did not say that receipts were provided throughout the case.

¶14 We also reject Father's contention that the overall evidence was insufficient or stale. ADES presented the testimony of its witnesses and introduced hundreds of pages of exhibits in support of its motion for termination. Father was given the opportunity to cross-examine the witnesses and to present his own evidence challenging that submitted by ADES. We do not reweigh the evidence on appeal. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (resolution of evidentiary conflicts are uniquely the province of the juvenile court as the trier of fact). Thus, on this record, the juvenile court's order granting severance based upon a finding of neglect is not clearly erroneous.

B. Fifteen Months' Out-of-Home Placement

¶15 Although we are not required to do so, we also conclude that the record supports the juvenile court's finding based on the children's out-of-home placement for more than fifteen months. Pursuant to A.R.S. § 8-533(B)(8)(c), the court could properly sever Father's rights if: (1) the children had been in out-of-home placement for fifteen months or longer; (2) Father had been unable to remedy the circumstances causing the children to be in out-of-home placement; and (3) a substantial likelihood existed that he would not be able to properly care for the children in the near future. We consider "those circumstances existing at the time of the severance that prevent a parent from being able to appropriately provide for his or her children." *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 22, 152 P.3d 1209, 1213 (App. 2007) (internal quotes and citation omitted). To avoid severance, the parent must make more than trivial or de minimus efforts at remediation. *Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576 n.1, 869 P.2d 1224, 1229 n.1 (App. 1994).

¶16 Here, the court found that the children were in an out-of-home placement for fifteen months or longer and that ADES made diligent efforts to provide appropriate reunification services to Father. The court further found that although Father had participated in these services, he was not able to

remedy the circumstances that caused the children to be in an out-of-home placement. The court noted that the children had been in and out of the care of ADES for approximately five years and that the children were returned to Father on at least four occasions. Each time, however, ADES had to later remove the children because of Father's unstable employment and housing. Based on these circumstances, the court concluded there is a substantial likelihood that "given the amount of time that the children have been in the Department's care that the [F]ather will not be capable of exercising proper and effective parental care and control in the near future."

¶17 The record supports the court's findings. From 2005 to 2007, the children were repeatedly removed from Father's care due to Father's inability to provide stable housing and adequate supervision and because there were concerns that Father could not maintain employment or provide for the children's basic needs.⁸

¶18 Father showed limited improvement at the time of the severance hearing. Prior to the severance hearing, Father had allegedly obtained housing and employment; however, he was unable to provide adequate proof of either. Father's housing

⁸ The children were removed from Father's care for the following time periods: June 2, 2005 through July 22, 2005; February 26, 2006 through May 8, 2006; October 27, 2006 through July 26, 2007; and October 23, 2007 through the date of the severance hearing.

remained unstable as Father had moved several times in the past seventeen months. Additionally, Father failed to produce any paystubs or other evidence of employment despite CPS' repeated requests. We conclude that, although Father made many efforts to remedy the circumstances that led to the removal of the children from his care, his inability to remedy such circumstances over an extended period of time supports the court's conclusion. See *Matter of Pima County Severance Action No. S-2397*, 161 Ariz. 574, 577, 780 P.2d 407, 410 (App. 1989) (finding unchanged circumstances over three year period sufficient to support severance).

C. Best Interests

¶19 Father also appears to argue that the juvenile court's severance order was not in the children's best interests. We disagree.

¶20 In considering the children's best interests, the court must determine how the children would benefit from the severance or be harmed by the continuation of their relationship with the parent. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6-7, 804 P.2d 730, 735-36 (1990). This may be demonstrated by proving the existence of an adoption plan, by showing the children are adoptable, or that the children's existing placement is meeting their needs. *Mary Lou C. v. Ariz.*

Dep't of Econ. Sec., 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004) (citations omitted).

¶21 The case manager testified that severance and adoption was in the children's best interests because they were in need of permanency. She stated it was in the children's best interest because of the length of time the case had been open and the instability the children had faced. Since 2004, the children have lived in at least eight out-of-home placements. At the time of the severance hearing, the children were living with an adoptive foster placement and the placement was meeting the children's needs, was safe, and was stable. The children received needed services, including individual counseling, necessary medication, and support in school. The foster family desires to adopt the children and the children have developed a bond with the family during the twenty-two months they have lived with them. While R.L. expressed love and a desire to live with Father in an ideal world, through her attorney she expressed her preference to live with her foster family and thus she consented to the adoption. We conclude that reasonable evidence exists to support the court's determination that termination was in the children's best interests.

CONCLUSION

¶22 For the foregoing reasons, we affirm the court's order terminating Father's parental rights.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

DONN KESSLER, Judge