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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT R.,)	1 CA-JV 09-0215
)	
Appellant,)	DEPARTMENT C
)	
v.)	
)	MEMORANDUM DECISION
ARIZONA DEPARTMENT OF)	(Not for Publication -
ECONOMIC SECURITY,)	Rule 103(G), Ariz. R.
M.N. ¹ ,)	P. Juv. Ct; Rule 28,
)	ARCAP)
Appellees.)	

Appeal from the Superior Court in Maricopa County

Cause No. JD-16127

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By David M. Osterfeld, Assistant Attorney General
Attorneys for Appellee Ariz. Dept. of Econ. Sec.

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By John L. Popilek
Attorneys for Appellant/Father

Scottsdale

K E S S L E R, Judge

¹ It is ordered directing the Clerk of the Court to change the caption to reflect the changes made here. All future pleadings shall use this caption.

¶1 Robert R. ("Robert") appeals the juvenile court's order severing his parental relationship with his biological daughter ("the Child"), pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8)(c) (Supp. 2009). Robert argues the juvenile court's finding that he failed to remedy the circumstances which caused the child to remain in out-of-home placement and was not capable of providing proper care and control in the near future was clearly erroneous and contrary to substantial evidence in the record. We affirm the juvenile court because there is sufficient evidence in the record to support the court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The child was born on October 15, 2007 and was taken into temporary physical custody by Arizona Department of Economic Security ("ADES") on October 17, 2007. The child was taken by ADES because she tested positive for methamphetamines at birth and her mother, Danielle N. ("Danielle"), admitted to using methamphetamines while pregnant. A paternity test determined that Robert is the child's biological father. The original case plan laid out by Child Protective Services ("CPS") was family reunification. Consistent with the plan, Robert was offered a number of services including: paternity testing, parent aide services, parenting classes, drug testing,

visitation with the child, and transportation to and from visitation.

¶13 The child is a developmentally disabled child. She requires physical therapy, occupational therapy, speech therapy, and special, early intervention, educational instruction. The child's physical therapy is required because she is "low tone," meaning that she lacks the postural strength most children possess. While aggressive physical therapy has helped to curb the effect of her low tone, she still shows postural weakness and has some difficulty holding herself upright. The child's speech is not as developed as it should be but, again due to aggressive therapy, she is making progress towards normalcy. In addition to these issues the child is a "silent aspirator," which means she doesn't swallow correctly and it is possible that food and fluid can drip into her lungs. One of the child's doctors testified that the condition is so severe that it can lead to hypoxia and death if not monitored by her caregiver.

¶14 In November of 2007 Robert was arrested in Navajo County when, after a traffic stop, police officers discovered methamphetamine, marijuana, drug paraphernalia, and forgery devices in a car being driven by Robert. Robert eventually pled guilty to one count of possession of a dangerous drug under A.R.S. § 13-3407(A)(1) (2010) and criminal possession of a forgery device under A.R.S. § 13-2003(A)(2) (2010). While in

jail awaiting sentencing, Robert completed a self-study parenting course, an anger management course, a twelve-step program, and obtained his GED. Robert was sentenced to a short prison sentence and placed on probation on June 23, 2008. Robert was released from prison in late October of 2008, however, he didn't communicate with the case manager in the child's case until the end of November or beginning of December.

¶15 After moving back to Phoenix at the end of 2008, Robert obtained a job at Shamrock Farms and began submitting urinalysis both for his probation and as part of the family reunification effort. All of the samples Robert submitted were negative. However, seemingly after the case plan had changed from one of family reunification to severance and adoption, Robert missed seven to nine drug tests even after being informed that CPS considers a missed test a "dirty" test. Also after he returned to Phoenix, Robert started completing parenting courses set up by his parent aide, eventually finishing all 16 modules offered to him.

¶16 In January 2009 Robert met with Dr. Al Silberman, a psychologist, to undergo a psychological evaluation at the request of CPS. Dr. Silberman diagnosed Robert as having an antisocial personality and recommended that Robert stay sober and out of trouble for a year before placing a child with him was even considered. At the severance trial, Dr. Silberman

testified that, in his opinion, Robert was not credible or honest. Dr. Silberman also testified that individuals with antisocial personality disorder are generally "people who are not responsible, who can't be counted on, who are not credible in what they say, who don't stick to what they say, who keep getting into trouble usually until somewhere around 40, and then people seem to get better." Additionally, Dr. Silberman noted that individuals with antisocial personality disorder are generally irresponsible parents. Dr. Silberman stated that parents with antisocial personality disorder "may love their child at some level, but they're not going to be responsible. They're going to be angry. They're going to be not responsible financially. They're not going to always show up when they should . . . but they may love their child at some level."

¶17 Robert began his visitations with the child in January 2009. Victor Soto ("Soto"), the parent aide assigned to Robert, observed the interaction between Robert and the child and served as Robert's main point of contact with respect to the family reunification plan. Soto testified at the severance trial that Robert's interaction with the child had been an "up-and-down process" with some positive interaction as well as some negative interaction. Soto testified that Robert had been consistent about attending almost all of his scheduled visits despite having to travel a long distance to get to the visits.

He also stated that Robert did a good job of completing his parenting courses and that, while at some visits it would take the child a few minutes to get warmed up to Robert, in other visits she would bond with him immediately.

¶18 The placement mother had planned a two-week trip to a family reunion in Oregon which was to occur just prior to the termination hearings. Robert's counsel was informed of the trip and of the need to raise any objections to the child accompanying the placement mother on the trip before June 4 so that the placement mother could get the most affordable airfare. Despite this notice, Robert failed to object to the travel until June 8. Robert claimed that to take the child away at this "critical stage would upset the bond that [Robert] is developing with [the child]." The juvenile court had a hearing regarding the objection to travel. At the hearing the attorney for the State pointed out that the child's therapist thought it best if she accompanied her placement mother on the trip. The juvenile court denied Robert's request to prevent travel, as well as his request to continue the trial because of the travel, but ordered that any visits Robert missed because of the travel be made up.

¶19 Despite Robert's consistency in attending his classes and visitation sessions, Soto testified he harbored serious concerns about Robert's fitness as a parent. Soto's primary concern was his impression that Robert failed to appreciate the

severity of the child's disabilities. Soto testified that Robert appeared to believe he didn't need to adhere to a list of food approved as appropriate for the child's condition. Soto related the fact that, on at least one occasion, Robert gave the child food that was not approved by her doctor.

¶10 Soto was also concerned about a number of instances in which Robert improperly handled the child. First, Soto testified Robert would forcefully push the child down if she started squirming when he changed her diaper. He also testified that Robert hoisted the child up by her arms on more than one occasion, even after being warned by Soto that such action could result in a dislocated shoulder.

¶11 Additionally, Soto indicated that on two occasions Robert's negligence led to falls by the child. The first occasion was during a train ride that the child and Robert took at a local park. While the train was moving Robert stopped paying attention to the child and she slipped out of her seat. Later, when the pair was exiting the train, Robert took his attention off of the child as he reached to get her bag and she slipped into the gap between the train and the platform. The second occurrence was at a local mall when Robert was holding the child in an elevator and she slipped out of his grasp and brushed her face on the side of the elevator.

¶12 Soto raised other concerns he had about Robert's fitness as a parent. Despite his probation agreement forbidding Robert from consuming alcohol or entering bars, Robert told Soto on one visit that he had gotten "wasted" the night before and later asked Soto to lie about the statement in his report. On another visit Robert told Soto that he had been out at a bar the weekend before. Soto also testified that Robert often showed up without the supplies he was supposed to bring to visits and was forced to use the supplies brought by the placement mother.

¶13 Soto's final concern was over the way that the child reacts to Robert. While the majority of the time the child and Robert spent together was pleasant, Soto was concerned because when the child became distressed she turned to Soto or her placement mother for support, not to Robert. The child's actions in this area were, according to Soto, not normal. He testified that in most visitation situations when a child is in distress they turn to their biological parent for support.

¶14 At the time of trial Robert was unemployed, living in an apartment subsidized by his mother, did not own a car, stated he would be relying on his younger sister - who was caring for a newborn of her own - to watch the child while he worked (assuming he was successful in finding employment), and was allegedly involved in a fraudulent scheme against Wal-Mart similar to a prior scheme for which he was on probation.

¶15 On November 12, 2009 the juvenile court entered a signed "Findings of Fact, Conclusions of Law, and Order" terminating the parent-child relationship between Robert and the child pursuant to A.R.S. § 8-533(B)(8)(c). Robert timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1), and -2101(B) (2003).

ISSUES PRESENTED FOR REVIEW

A. Waiver

¶16 The State argues that Robert failed to cite to the record in his opening brief and that case law in Arizona requires that we deem his argument abandoned. We disagree. Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(6) requires the brief of the appellant to set forth "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to . . . parts of the record relied on." Robert cites extensively to the record in his "Statement of the Case" and "Statement of Facts" sections and references facts presented therein in his "Argument" section. While it is true that Robert does not cite directly to the record in his "Argument" section, this is not enough to deem his argument abandoned.

¶17 In support of its position, the State cites to *Watahomigie v. Ariz. Bd. Of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) and *Ramirez v. Health Partners*

of *S. Ariz.*, 193 Ariz. 325, 327 n.2, 972 P.2d 658, 660 n.2 (App. 1998), however these cases, and others, actually cut against the State's position. In *Watahomigie* we deemed one of the appellant's arguments waived when appellant's brief failed to cite to *any* authority to support the argument. *Watahomigie*, 181 Ariz. at 26. *Watahomigie*, therefore, presented a different issue from the one in this case where Robert does cite to the record extensively, albeit not in his "Argument" section.

¶18 In *Ramirez* the appellant's brief contained no citations to an undisputed record. *Ramirez*, 193 Ariz. at 327 n.2, 972 P.2d at 660 n.2. We cautioned "counsel that this court may disregard their statements of facts if they fail to comply with Rule 13." *Id.* (citing *Lansford v. Harris*, 174 Ariz. 413, 417 n.1, 850 P.2d 126, 130 n.1 (App. 1992)). Despite the technical shortcomings of the brief in *Ramirez* we nevertheless declined to dismiss the appeal and instead addressed appellant's arguments on the merits. Additionally, it is noteworthy that *Ramirez* warns that we "may disregard [appellant's] statements of facts if they fail to comply with Rule 13" but does not mandate dismissal for failure to adhere to the technical requirements of ARCAP 13. *Id.* (emphasis added).

B. Was the juvenile court's finding that Robert had failed to remedy the conditions that caused the child's out-of-home placement clearly erroneous?

Standard of Review

¶19 On appeal we accept the juvenile court's findings in support of termination of the parent-child relationship unless such findings are clearly erroneous. *Maricopa County Juv. Action No. JS-4374*, 137 Ariz. 19, 21, 667 P.2d 1345, 1347 (App. 1983); see also, *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) ("We will not disturb the juvenile court's order severing parental rights unless its factual findings are clearly erroneous, that is, unless there is no reasonable evidence to support them."). We view evidence in the light most favorable to affirming the findings of the juvenile court. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶20 A termination order must be supported by clear and convincing evidence that the statutory ground for termination exists. *Maricopa County Juvenile Action No. JS-6831*, 155 Ariz. 556, 558, 748 P.2d 785, 787 (App. 1988). Here, the juvenile court found that severance was proper under A.R.S. § 8-533(B)(8)(c). Therefore, in order to uphold the juvenile court's ruling we must find that the State proved, by clear and convincing evidence, that:

The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to [A.R.S.] § 8-806, the parent has been unable to remedy the circumstances that cause the child to be in out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

A.R.S. § 8-533(B)(8)(c). Additionally, the statute instructs the juvenile court to "consider the best interests of the child" when making its decision as well. A.R.S. § 8-533(B).

Discussion

¶21 Robert argues there is substantial evidence in the record indicating he remedied the circumstances that caused the out-of-home placement and the court erred in keeping him from learning and demonstrating parenting skills when it allowed M.N. to travel out of town before the severance trial. We disagree.

¶22 There is sufficient evidence that Robert was unable to remedy the causes for the out-of-home placement. Robert is continuing to engage in behavior that would put the child's well-being in jeopardy. He is allegedly still engaged in criminal activity vis-à-vis a scheme designed to commit fraud against Wal-Mart. Additionally, he reported to Soto that he had been out drinking at bars and that he had gotten "wasted" the night before a scheduled visit. Not only are these actions violations of Robert's probation agreement but they also counsel in favor of severance when one considers the testimony of Dr.

Silberman who stated that he would want Robert to be clean and sober for a year before he even considered reunifying him with the child.

¶23 There is also sufficient evidence supporting the juvenile court's decision that Robert is incapable of exercising proper and effective care and control for the child in the near future. First, while Robert puts a great deal of weight on the fact that the court below permitted the child to leave the state with her placement mother for two weeks, the juvenile court's decision to permit travel was not clearly erroneous. It was based on the opinion of the child's therapist that it would be much better for her to travel with her placement mother than it would be to stay in temporary care while her placement mother was gone for two weeks. Robert's opening brief intimates that one of the grounds supporting severance, ADES' concern over the fact that Robert failed to demonstrate parenting skills, was only present because he was unable to "learn and demonstrate" these skills when the child went out of town. However, Robert and the child had been participating in visitations for six months at the time of the trip. We cannot conclude that, had Robert only had two more weeks of uninterrupted visitation, Robert would have transformed into a parent with skills necessary to rectify this deficiency. The bulk of the evidence

indicates that an additional two weeks wouldn't have been a panacea for Robert's parenting deficiencies.

¶124 The parent aide, Soto, testified that Robert handled the child too roughly on occasions and that he often failed to show up with the proper supplies. More significantly, Soto noted that whenever the child would get distressed during a visit she turned to either the placement mother or Soto himself for comfort as opposed to Robert. Two more weeks of visitation, after six months of visitation, would not have corrected these problems.

¶125 A number of other factors support the court's conclusion Robert was not capable of providing proper care and control for the child in the near future. First, Robert failed to appreciate the potentially life-threatening medical conditions afflicting the child. Soto testified that Robert didn't believe he needed to adhere to the list of foods approved by the child's doctors when feeding her. Soto testified that Robert said that if the child were to live with him he would let her eat whatever she wanted. This attitude raises serious doubts as to Robert's ability to exercise proper and effective control over the child in the near future as required by A.R.S. ¶ 8-533(B)(8)(c).

¶126 Second, the record shows Robert failed to properly supervise the child during his visitation time with her. On at

least two occasions Robert stopped paying attention to the child long enough that he was unable to keep her from falling down.

¶127 Third, Robert is currently unemployed, has no reliable transportation, and lives in an apartment subsidized by his mother. It is unlikely that, given his current situation, Robert would be able to get the child to her various therapy appointments on a regular basis or provide her with the products and services recommended by her doctors.

¶128 The juvenile court is also required to consider the best interests of the child. A.R.S. § 8-533(B). The record supports the court's conclusion that the child is best served by remaining with her placement mother who has raised her since just after birth. Robert's actions in going out and getting "wasted" a night before he had a scheduled visit with the child indicate that he is not ready for the full-time job of raising a young child with special needs. Moreover, as noted above, the evidence shows he is not capable of meeting her special needs. In contrast, the record shows the placement mother has done an excellent job with the child and the great strides the child has taken in therapy while placed in out-of-home care.

¶129 While Robert did participate in all the services offered to him by the State, this is not enough to render the juvenile court's ruling clearly erroneous. A.R.S. § 8-533(B)(8)(c) does not provide that a biological parent can

defeat severance by showing that he or she took advantage of all the programs offered by the State. The services are a means to an end, not an end in themselves. They are there to help the parent remedy the circumstances that precipitated out-of-home placement and become capable of exercising proper care and control in the near future.

CONCLUSION

¶30 For the reasons stated above, we affirm the decision of the juvenile court.

/S/

DONN KESSLER, Judge

CONCURRING:

/S/

PATRICK IRVINE, Presiding Judge

/S/

MICHAEL J. BROWN, Judge