

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11-16-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

JOSHUA M.,) 1 CA-JV 10-0050
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, CHANCE C., MCKINNLEY) Not for Publication -
M.,) (Ariz. R.P. Juv. Ct.
) 103(G); ARCAP 28)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD 15120

The Honorable Eddward P. Ballinger
The Honorable Cathy M. Holt, Judge

AFFIRMED

Terry Goddard, Attorney General Mesa
by Amanda Holguin, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

Popilek & Jones, P.A.
by John L. Popilek Scottsdale
Attorney for Appellant

W E I S B E R G, Judge

¶1 Joshua M. ("Father") appeals from the superior court's
order severing his parental rights to his two sons. He argues

that the court's supporting findings were clearly erroneous and that the court erred in concluding that severance was in the children's best interests. For reasons that follow, we find no abuse of discretion and affirm.

BACKGROUND

¶2 In November 2007, the Arizona Department of Economic Security ("ADES") filed a dependency petition regarding Father's two sons and removed the children. Father and his wife, the children's mother, were living with her parents in a home that was "in deplorable condition" and "allegations of physical abuse." C. was eighteen months old and M. was five months old. In January 2008, the court approved placing the children with their maternal great aunt.

¶3 In July 2008, the court ordered that ADES arrange counseling and a Terros assessment for Father. At an October hearing, ADES advised the court that Father had been complying with services; the case plan remained family reunification.

¶4 In April 2009, however, the case plan was changed to severance and adoption. ADES filed a motion for termination of parental rights and noted that Father's last known address was unknown. The motion cited Arizona Revised Statute ("A.R.S.") section 8-533(B)(8)(a) and (c) (nine and fifteen months out of home).

¶15 Trial took place on September 29, 2009 but began again on February 18, 2010. At trial, ADES relied solely on the statutory provision governing children out of the home for fifteen months. A.R.S. § 8-533(B)(8)(c) (fifteen months or more in care, parent unable to remedy the causes, and substantial likelihood that parent cannot exercise care and control in near future).

¶16 After hearing the evidence, the court found that aside from one month in October 2006, Father, who was then twenty-nine, had lived his entire life with his parents, in-laws, or in a therapeutic residence. He was "incapable of maintaining an independent residence or . . . establish[ing] long-term appropriate shelter for the children." He also was unemployed and had "no reasonable prospect of employment in the foreseeable future." Even when employed, Father had "not and could not provide financial support for his children." Although Father had complied with some ADES directives, he "did not, however, address serious impediments to safe reunification [with] the children." Furthermore, C. "has significant special needs that Father cannot effectively address and in the reasonable future will continue to not be able to ensure that [he] receives adequate care." Therefore, the court found from clear and convincing evidence that Father was unable to provide appropriate care, shelter, or support and that a substantial

likelihood existed that he would not be capable of doing so in the near future. Finally, the court found that by a preponderance that the children were adoptable and would benefit from living in a safe, stable home in which their social, medical, emotional, and physical needs could be met, and that it was in the children's best interests that Father's rights be terminated.¹

¶7 Father timely appealed. We have jurisdiction pursuant to A.R.S. § 8-235(A) (2007).

DISCUSSION

¶8 In order to sever a parental relationship, the superior court must find clear and convincing evidence of the existence of at least one of the statutory grounds listed in A.R.S. § 8-533(B). *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). Here, the court relied upon A.R.S. § 8-533(B)(8)(c)(2009).² The court also must find by a preponderance of the evidence that severance is

¹Mother's parental rights were terminated in May 2010.

²Under A.R.S. § 8-533(B)(8)(c), the court may terminate the parent-child relationship if "[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer . . . and the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care in the near future."

in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶9 At trial in February 2010, Father testified that he was unemployed and had been so since December 2008; that he had quit because of back problems; that he was living with his sister-in-law, who paid all of the bills; that he was on probation for a felony drug conviction until September 2010; that he had been taking medication for a mood disorder and depression since October 2007; that if the children were returned to him, he would see if his father would let the family live with him; that he had applied for disability and been turned down but was "getting ready to call a lawyer."

¶10 Father acknowledged that CPS had asked that he find a place to live and produce an income, neither of which he had accomplished. He also had stopped attending marriage counseling because the counselor advised him and his wife to get a divorce. Father knew that C. had special needs but did not know what those needs were, what regular medical care he required, or what medications either child was taking. Father said that he would use his wife's food stamps to provide food for the children and that he worked a few side jobs and earned \$20 to \$30 a week.

¶11 Father's case manager testified that she had been working with Father since December 2007, that he had participated in drug treatment through his probation, submitted

to urinalysis, and received parent aide services. She testified that Father had received psychiatric services but for four to six months in 2008 had not taken his medication. Father completed a psychological evaluation.

¶12 The case manager said that although Father did fine during his visits with the children, she had concerns about his ability to care for the children all day, every day; he had not found stable housing, employment, or transportation. Marriage counseling ended because Father and Mother were not taking it seriously and not making any progress. Despite working with a parent aide for almost two years, Father's visits never progressed to unsupervised or to a home setting, and he did not parent the children without directions from his wife.

¶13 Father's case manager testified that M. was placed with his great aunt, that she was willing to adopt, and that severance was in M.'s best interest. The children's case manager testified that C. was autistic with "extremely delayed" speech, was physically "quite aggressive," and bites, kicks and hits. His numerous health problems require physical, speech, and occupational therapy. C. also was placed with his great aunt who was meeting all of his needs and wished to adopt him. Furthermore, both children would benefit from having permanency, stability, and care from a person aware of their needs.

¶14 When this court reviews a severance order, we "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). An order is based upon clearly erroneous findings if the findings are not supported by "reasonable evidence." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). We accord great deference to the trial court because it "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205 (citation omitted).

¶15 Based on the record, the court's findings are supported by reasonable evidence. It was undisputed that Father has been unable to earn a living or follow through in obtaining disability, to maintain an independent residence, or to grasp and meet the needs of his children. Father suggests that his ability to obtain disability would occur in the near future, but this suggestion is based on mere speculation unsupported by any evidence. Furthermore, no evidence even implied that the children regarded Father as their caregiver or parent and thus would feel "abandoned" by him. To the contrary, the evidence supports a conclusion that severance was in the children's best

interests. Accordingly, we affirm the order severing Father's parental rights to C. and M.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
PHILIP HALL, Presiding Judge

/s/ _____
PETER B. SWANN, Judge