DIVISION ONE
FILED: 12/07/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HERVEY G., SR.	)	1 CA-JV 10-0112
	)	
Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, HERVEY G., JR.	)	103(G) Ariz.R.P. Juv. Ct.; Rule 28 ARCAP)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD17610

The Honorable Christopher A. Coury, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Carol A. Salvati, Assistant Attorney General
Attorneys for Appellee/Arizona Department of Economic Security

Popilek & Jones PA — Scottsdale
By John L. Popilek
Attorneys for Appellant/Hervey G., Sr.

K E S S L E R, Judge

¶1 Hervey G., Sr. ("Father") appeals the superior court's order terminating his parental relationship with his son, Hervey G., Jr. ("Son"), pursuant to Arizona Revised Statutes ("A.R.S.")

section 8-533(B)(1) and (B)(8)(a), (b), and (c) (Supp. 2009).[1] For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father is the legally presumptive father of Son, who was born in August 2007. Father was present at Son's birth and signed Son's birth certificate. Father moved to Idaho shortly after Son's birth. Son resided with his mother ("Mother") in a group home because she herself was dependent and under the care of the Arizona Department of Economic Security ("ADES").

¶3 In December 2008, ADES filed a dependency petition alleging Son to be a dependent child under A.R.S. § 8-201(13) (Supp. 2009). ADES alleged that 1) Mother parented with physical abuse and was too mentally ill to parent,[2] and 2) Father neglected and abandoned Son, and he could not parent due to substance abuse and domestic violence. Father denied the allegations, but did not contest the dependency. The court found Son dependent as to Father, and at a later hearing

[1] We cite to the most current version of the statute when it has not been substantively revised since the date of the underlying conduct.

[2] In a separate trial, the court terminated Mother's parental rights on both mental illness and mental deficiency grounds under A.R.S. § 8-533(B)(3), and out-of-home placement for fifteen months or longer under § 8-533(B)(8)(c). Mother has filed a separate appeal from the termination of her parental rights. *Christina G. v. Ariz. Dep't Econ. Sec.*, 1 CA-JV 10-0143 (filed June 30, 2010).

dependent as to Mother. The case plan was reunification, and ADES placed Son in a foster home.

¶4 After the dependency determination, Idaho's Department of Health and Welfare conducted an Interstate Compact on the Placement of Children ("ICPC") home study on Father and Father's parents, with whom Father lived in Idaho when not incarcerated. The ICPC evaluators recommended that Son not be placed with Father or Father's parents. Father showed "a pattern of spending time in jail due to court sanctions" and Father did not "have any verifiable income to support" Son. Father's father had an active warrant out of Phoenix that he refused to address.

¶5 Between December 2008 and October 2009, Father engaged in continued criminal behavior related to alcohol abuse and drugs, violated probation, did not attempt to see Son even though he was in Phoenix for a few months, and had unstable employment.

¶6 ADES filed a motion for termination of the parent-child relationship for both Mother and Father. Regarding Father, ADES alleged that he abandoned Son under A.R.S. § 8-533(B)(1), and Son was in out-of-home placement for six months under § 8-533(B)(8)(b) and nine months under § 8-533 (B)(8)(a). ADES filed an amended motion, additionally alleging that Son was being cared for in out-of-home placement for fifteen months or longer under A.R.S. § 8-533(B)(8)(c).

¶7 At the recommendation of Mother, ADES placed Son with his prospective adoptive parents, Rick and Delilah S. During this time, Father requested that his aunt's family ("Aunt") also be considered as a prospective adoptive family for Son if the court terminated his parental rights. Because Aunt lived in Texas, Texas conducted an ICPC home study, and it recommended that Aunt's home was suitable for Son's placement.

¶8 The trial court heard arguments for the change of placement and termination of parental rights in the same hearing. Father testified that shortly after Son's birth, he moved to Idaho. He saw Son only a few times, and he did not talk to Son on the phone, pay child support, send Son gifts or attend birthdays, write Son letters (except for a week before the severance hearing), send Son pictures of him or his family in Idaho, or seek custody of Son before the severance proceedings. Father testified that he had an alcohol problem, but he had been sober for a year. Both Aunt and Delilah testified about their willingness to adopt Son. The ADES caseworker testified that ADES requested Father complete all requirements of his probation, drug court, anger management, and receive a psychological evaluation. ADES also required Father to become employed and have stable housing. Father completed the psychological evaluation. However, the ADES caseworker testified that Father did not complete the anger management

class or the parenting class, even though Father claims he did. The caseworker informed the court that Father did not provide documentation of his drug tests, and Father admitted that he violated his probation as recently as one month before the termination hearing

¶9 The trial court denied the change of placement at the end of the hearing, finding that remaining with Delilah's family was in Son's best interest. About two weeks after the hearing, the court terminated the parent-child relationship, finding that ADES proved by clear and convincing evidence that Father's parental rights should be terminated under A.R.S. § 8-533(B)(1), (B)(8)(a), (B)(8)(b), and (B)(8)(c). The court also found by a preponderance of the evidence that termination was in the best interest of Son.

¶10 The trial court issued a signed minute entry regarding the change of placement on May 13, 2010. As for the termination proceedings, the court issued an unsigned minute entry on May 13, 2010, stating the factual findings for terminating Father's parental rights. Father filed separate notices of appeal from both rulings on May 21, 2010. The court issued its signed "Findings of Fact, Conclusions of Law, and Order" terminating Father's parental rights on June 28, 2010. We have jurisdiction

pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1) (2003), and -2101(A),(B) (2003).[3]

STANDARD OF REVIEW

¶11 On appeal, "we will 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).

DISCUSSION

¶12 Father argues that the trial court erred by holding that Father abandoned Son, Father would not be capable of parenting Son in the near future, and termination was in the

[3] Although Father's notice of appeal regarding the termination was premature, it did not prejudice ADES and it was followed by a final appealable judgment that was ministerial. *See Performance Funding, LLC v. Barcon Corp.*, 197 Ariz. 286, 288, ¶ 5, 3 P.3d 1206, 1208 (App. 2000) (citing *Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981)); *see also Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 415, ¶ 37, 132 P.3d 1187, 1195 (2006) (holding that a notice of appeal is merely premature if filed after "the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial"). In such a situation, a premature notice of appeal takes effect when the court enters the final judgment. *Schwab v. Ames Constr.,* 207 Ariz. 56, 58, ¶ 9, 83 P.3d 56, 58 (App. 2004). Accordingly, the appeal from the termination ruling became effective on June 28, 2010, when the appealable judgment was entered. Father's notice of appeal from the custodial placement decision was timely and not premature because the court signed the order on May 13, 2010, and the order is an appealable order under *In re Maricopa Cnty. Juv. Action No. JD-500116*, 160 Ariz. 538, 542-43, 774 P.2d 842, 846-47 (App. 1989).

best interest of Son. Father also argues that the court erred when it denied an extension of time for Father to complete reunification requirements and denied a change of placement to Aunt.

¶13 To terminate parental rights, the trial court must find by clear and convincing evidence the existence of at least one statutory ground provided 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). It must also find by a preponderance of the evidence that termination is in the best interest of the child. *Id.*; *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005).

I. The trial court did not err in finding Father abandoned Son under A.R.S. § 8-533(B)(1).

¶14 The trial court terminated Father's parental rights under A.R.S. § 8-533(B)(1). Because the concepts underlying abandonment are "somewhat imprecise and elastic," "questions of abandonment and intent are questions of fact for resolution by the trial court." *In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990). On review, we examine the facts in a light most favorable to sustaining the juvenile court's findings. *Michael J.*, 196 Ariz. at 250, ¶ 20, 995 P.2d at 686.

¶15 The parent-child relationship may be terminated when the "parent has abandoned the child," A.R.S. § 8-533(B)(1), with "abandonment" defined as:

> [T]he 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.

A.R.S. § 8-531(1) (2007). When determining whether a father abandoned his child, the trial court uses an objective standard, focusing on his conduct and not his intent. *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86.

¶16 The trial court found that Father abandoned Son.[4] It found that after Son's birth, Father did not visit Son until after ADES removed Son from Mother's home in December 2008. At that visit, Father saw Son only for a few hours. Father did not send Son letters, pictures, or gifts on birthdays and holidays.

[4] *Cf. In re Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 93-94, 876 P.2d 1121, 1128-29 (1994) (citing *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)) (holding that an unwed biological father is not automatically entitled to the highest constitutional protection; rather, he "must [] take steps to establish a parent-child relationship before" he can "attain fundamental constitutional status").

¶17 Father argues that he tried to visit Son while he was in Arizona for three months during 2009, but Mother often did not allow him to spend time with Son. Father also argues that his incarceration prevented him from seeing Son, and the court cannot terminate parental rights based on his incarceration alone.

¶18 The record supports the trial court's findings. While Father was unable to exercise traditional methods of bonding with Son because he lived in Idaho, he did not act persistently in creating a relationship with Son by calling, writing letters, sending pictures, and sending child support. Father testified that he did not visit Son, except for the three month period in 2009. However, ADES disputed that Father saw Son during that time period because Son was in a foster home beginning in December 2008, and Father never contacted ADES to visit Son. Father admitted he never contacted ADES other than right before the severance proceedings to visit Son. Further, he did not send cards, gifts, pictures, letters, or call Son; and he did not pay child support. After considering Father's conduct, we defer to the court's credibility determination whether Father visited Son in 2009, *see Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998), and we find there was sufficient evidence to support the court's conclusion that Father abandoned Son after Son's birth. Accordingly, the court

did not err in finding that Father abandoned Son under A.R.S. § 8-533(B)(1).

¶19 "If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds." *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205. Because we find that the court did not err in finding Father abandoned Son, we do not address the additional grounds for termination under A.R.S. § 8-533(B)(8)(a), (b), and (c).

II. The trial court did not err in finding that termination was in the Son's best interest.

¶20 The trial court found that Father's termination was in Son's best interest. The court must find by a preponderance of the evidence that termination is in the best interest of the child. *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685; *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022. Termination is in the best interest of the child if the child will benefit from the termination or would be harmed if the relationship continued. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App. 2008). Factors the court may consider include the child's adoptability or potential adoptive placement and whether the current placement is meeting the child's needs. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998).

¶21 The trial court found that ADES proved by a preponderance of the evidence that Son "is a young boy who is adoptable"; "[a]doption would provide [Son] with a stable and secure environment"; "[Son's] current placement is willing to adopt him"; and "[Son] has bonded with his current placement."

¶22 Father argues that the trial court's finding that termination was in Son's best interest was clearly erroneous. Father asserts that he had "grown up" at the time of the hearing and "had the ability and desire to care for his son." Father argues that he had a large and loving family to help care for Son and had steady employment. Father worries that Son will be psychologically damaged "from the false impression" that Father and Mother abandoned him.

¶23 The record supports the trial court's finding. Father was incarcerated at the time of the severance hearing, and while Father had a large family, ADES determined that his parents were not suitable for Son's placement. While Son was in out-of-home custody, Father did not call him and visited only once for a few hours. At the time of the hearing, Son had been with Delilah's family for more than five months and Delilah testified that her family was completing a course to be able to adopt Son. ADES and Delilah testified that Son had bonded well with Delilah's family.

¶24 Based on the foregoing, we find the evidence is sufficient to support the trial court's finding that ADES proved by a preponderance of the evidence that terminating Father's parental rights so that Son could be adopted was in the best interest of Son.

III. The trial court did not err in refusing Father's request to delay its decision to terminate Father's parental rights.

¶25 Father argues that he asked the trial court for an extension of time before the court terminated his relationship so that he could get a place suitable for Son to live, and the court "abused its discretion in failing to grant" his request. Rule 46(A) of the Rules of Procedure for the Juvenile Court requires motions to be "in writing, unless otherwise authorized by the court, and shall set forth the basis for the relief sought." A motion to continue "shall be made in good faith and shall state with specificity the reasons for the continuance." Ariz. R.P. Juv. Ct. 46(F).

¶26 During closing arguments, Father requested that the judge not terminate his parental rights on the day of the hearing, but to wait until he got a place suitable for Son and for a new ICPC to be completed. The court took the termination matter under advisement. The court did consider Father's request, but held "these aspirations, though commendable, to be speculative and not concrete."

¶27 Father's request for the court to delay its ruling on the termination matter was not a motion to continue, but rather a plea to the court to allow Father more time to meet reunification requirements. The request was not in writing, and there is no indication in the record that the court believed the request was a motion for a continuance. Furthermore, any motion to continue on the basis of requesting more time to meet ADES's requirements should have been made before the hearing. In any event, Father had violated probation one month before the termination hearing, thereby providing ample reason for the court to refuse Father's request to delay its decision whether to terminate Father's parental rights.

¶28 Therefore, the trial court did not err in failing to delay its ruling on terminating Father's parental rights.

IV. The trial court did not abuse its discretion when it denied Father's change-of-placement request.

¶29 Father argues that the trial court abused its discretion when it denied changing Son's placement to Aunt.[5]

[5] Father does not cite legal authority to support his claim, in violation of Arizona Rules of Civil Appellate Procedure. ARCAP 13(a)(6) ("The brief of the appellant shall concisely and clearly set forth . . . [a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Although we have the discretion to treat Father's failure to cite to authorities as a waiver of his argument, we decline to do so. *See Watahomigie v. Ariz. Bd. Of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994).

This Court has jurisdiction to review a parent's appeal from a trial court's order granting or denying a change of the child's custodial placement. *In re Maricopa Cnty. Juv. Action No. JD-500116*, 160 Ariz. 538, 542-43, 774 P.2d 842, 846-47 (App. 1989) (holding that a court's order granting a motion to change physical custody from one foster placement to another is a final order); *see In re Yavapai Cnty. Juv. Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984) ("[A]n aggrieved party may appeal an order issued pursuant to the juvenile court's periodic review of a determination of dependency or *of a custodial arrangement*, *see* A.R.S. § 8-515(C), (D)."") (emphasis added).

¶30 We have jurisdiction to review the trial court's ruling denying Father's request to change Son's placement to Aunt. The court issued a signed minute entry denying the change of placement, and Father timely appealed.

¶31 The State contends Father lacks standing to challenge the placement order because his parental rights were terminated, citing *Antonio M. v. Arizona Department of Economic Security*, 222 Ariz. 369, 370, ¶ 2, 214 P.3d 1010, 1011 (App. 2009) and *Sands v. Sands*, 157 Ariz. 322, 324, 757 P.2d 126, 128 (App. 1988). We disagree.

¶32 We construe Father's argument not as contesting any post-termination placement of Son, but as contesting the trial

court's decision to deny the pre-termination motion to change placement.[6] Father has standing to appeal the court's pre-termination ruling because the court consolidated the placement hearing with the termination hearing, and the court denied the change of placement request before granting the termination.

¶33 We review placement orders and subsequent orders ratifying placement for abuse of discretion. *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶¶ 7-8, 187 P.3d 1115, 1117 (App. 2008). The trial court has "substantial discretion when placing dependent children because the court's primary consideration in dependency cases is the best interest of the child." *Id.* at 404, ¶ 8, 187 P.3d at 1117. ADES must "place a child in the least restrictive type of placement available, consistent with the needs of the child." A.R.S. § 8-514(B) (2007). Although A.R.S. § 8-514(B) prefers placement with a relative above placement in foster care, placement according to the statutory preferences is not mandatory. *See Antonio P.*, 218 Ariz. at 405, ¶ 12, 187 P.3d at 1118.

[6] Indeed, the record on appeal and briefs do not indicate who, if anyone, adopted Son after the court terminated Father's parental rights. At the time of the hearing, Delilah and her husband were not certified to be foster parents or adopt, although they were completing classes to become certified to do both by July 2010. Aunt testified that she believed she was certified to adopt, but she did not receive any paperwork declaring so.

¶34 Father argued at the hearing that Aunt's family was financially qualified to provide for Son's needs, biologically related, willing to adopt Son, and had a strong support system in the extended family. Aunt's family had a "positive and stable relationship with each other," and could provide access to family medical history. Father asserted that Delilah's family was great, but Son would not have any problems adjusting to a new placement with Aunt.

¶35 However, the trial court found that there is "no evidence that the relatives in Texas have ever met or spoken to [Son], although they are qualified to care for [Son]"; "[Son] has bonded with his current placement and the current placement is taking good care of [Son]"; and Son refers to "his current placement as 'mommy' and 'daddy'." The court held that "[i]t is not in [Son's] best interest to move him from his current placement."

¶36 There is substantial evidence in the record to support the trial court's decision to deny Father's motion to change Son's placement to Aunt. Delilah testified that her family loved Son and was willing to adopt him. Delilah's family brought Son to get medical treatment when needed, and was attentive to watching Son for any developmental or behavioral problems. Delilah and her husband had a large, close extended family. The ADES caseworker testified that Delilah's family was

taking good care of Son. She recommended against placing Son with Aunt because ADES "did not think it was in the best interest of [Son] to move to another state with a relative that he's never met." She testified that Son had a parent-child relationship with Delilah's family and it would be harmful to Son to remove him from their home.

¶37 We conclude there is substantial evidence in the record to support the court's decision to maintain Son in his current adoptive placement. The court did not abuse its discretion in denying Father's motion for change of placement.

CONCLUSION

¶38 For the foregoing reasons, we affirm the trial court's decisions continuing Son's placement with his foster parents and terminating Father's parental rights.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DANIEL A. BARKER, Judge

/s/
JON W. THOMPSON, Judge