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



DIVISION ONE
FILED: 04/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DERRICK R.,) No. 1 CA-JV 11-0207
)
) DEPARTMENT E
Appellant,)
) MEMORANDUM DECISION
v.)
) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
ARIZONA DEPARTMENT OF ECONOMIC) ARCAP 28)
SECURITY, JAYDEN R.,)
)
)
Appellees.)

Appeal from the Superior Court in Maricopa County

Cause No. JD508108

The Honorable Raymond Lee, Judge

AFFIRMED

Thomas A. Vierling
Attorney for Appellant

Phoenix

Thomas C. Horne, Arizona Attorney General
By Eric Devany, Assistant Attorney General
Attorneys for Appellees

Mesa

H A L L, Judge

¶1 Derrick R. (Father) appeals the juvenile court's order severing his parental rights to Jayden R. For the following reasons, we affirm.

FACTUAL¹ AND PROCEDURAL BACKGROUND

¶2 Father is the biological father of Jayden, born in 2006.² Father lives in California and had minimum contact with Jayden prior to Jayden and Samantha's removal from Mother's home in August 2009. The children were removed due to safety concerns after Mother and Wesley were arrested for domestic violence, disorderly conduct, criminal damage, and possession of drug paraphernalia. The apartment was found "littered with drug paraphernalia," Samantha had received possible physical injuries from the domestic violence dispute, and she had a "red and blistering" diaper rash.

¶3 Father was not initially considered as a placement for Jayden because his paternity had not been established and there

¹ We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

² Lisa G. (Mother) consented to the termination of her parental rights to Jayden and she is not a party to this appeal. Father and Mother never married. Mother is also the biological parent of Samantha L., born in 2007. Samantha's biological father is Wesley L. Mother and Wesley also consented to the severance of their parental rights to Samantha.

was no order granting him custody rights.³ Father stated that he wanted to be considered for placement of Jayden once paternity was established. Paternity testing was completed in November 2009 and confirmed Father's paternity. Jayden was found dependent as to Father and committed to the care, custody, and control of the Arizona Department of Economic Security (ADES).

¶4 Although ADES initiated a request for Jayden's placement with Father through the Interstate Compact for the Placement of Children (ICPC) in May 2010, Father did not cooperate with the California ICPC evaluator in setting up a home study and submitting fingerprints and palm prints. Therefore, California "closed out" the ICPC in June 2010. In addition, Father failed to verify that he had complied with any of the suggested "visitation services," including urinary analysis testing and parent counseling. Although Father apparently exercised his visitation rights with Jayden following a court hearing, he did not appear for three visitations scheduled during March and July 2010. Further, he apparently had sporadic telephonic communication with Jayden but the record is unclear as to the frequency of these conversations. Other than one gift that his mother may have brought to Jayden when

³ When both children were conceived, Mother was married to a person whom she claimed was not the biological father of either child.

she came to visit her, Father did not send Jayden any gifts or letters or provide Jayden with any financial support while she was in the legal custody of ADES.⁴ Father appeared telephonically or in person for at least some of the periodic court hearings.

¶15 Although the case plan was initially family reunification, ADES moved to terminate Father's parental rights due to abandonment. The juvenile court changed the case plan to severance and adoption. The court read the Form 3 Notice to Parent in Termination Action to Father at the initial termination hearing on January 13, 2011, which included the following:

You are required to attend all hearings. If you cannot attend a hearing, you must prove to the court that you have good cause for not attending. If you fail to attend the initial termination hearing, pretrial conference, status conference, or termination adjudication hearing without good cause, the court may determine that you have waived your legal rights and admitted the allegations in the petition for termination. The hearings may go forward in your absence and the court may terminate your parental rights based on the record and evidence presented.

¶16 Father acknowledged that he understood what the court had read to him. When Father failed to appear at the August 22,

⁴ The children were returned to Mother's care on May 19, 2010, but thereafter removed from her care and placed in foster care when she was arrested for driving under the influence with the children present in the vehicle. At the time of the status hearing on August 22, 2011, Mother was in Perryville prison. The children were subsequently placed together with Samantha's paternal grandparents in Nevada.

2011 status conference, the juvenile court granted ADES's motion to "move in absentia against [Father] and enter a default against him."

¶7 Nesanet Berhane, the Child Protective Services (CPS) supervisor in this matter, testified that Father failed to maintain a normal parental relationship with Jayden by not following through with visitation services and he did not participate in the case plan offered him. She further stated that Father failed to provide reasonable support for Jayden and failed to maintain contact with her. Berhane also testified that the case plan calling for severance and adoption was in the children's best interests because of their need for permanency, consistency, and stability. Berhane elaborated that Samantha's paternal grandparents wished to adopt the children, and the adoption would provide them with the least restrictive placement given their needs.

¶8 The court found that ADES had proven by clear and convincing evidence that Father had abandoned Jayden, pursuant to Arizona Revised Statutes (A.R.S.) section 8-533(B)(1) (Supp. 2011), by a preponderance of the evidence and that termination of Father's parental rights would be in Jayden's best interest.

¶9 Before the court signed the final judgment, Father filed an Arizona Rule of Civil Procedure (Rule) 60(c) motion requesting that the judgment be set aside due to "excusable

neglect" because Father assumed, based on discussions with his attorney, that nothing of substance would occur at the status hearing. Thus, Father argued that he "elected to focus his efforts that day on maintaining his employment and let an expectedly minor court hearing proceed in his absence." Father also asserted that he had a meritorious defense to the claim of abandonment. The court denied the motion before it signed the final judgment.

DISCUSSION

¶10 On appeal, Father asserts that: (1) The juvenile court abused its discretion, and violated Father's due process rights under the Fourteenth Amendment, by proceeding in absentia against Father;⁵ (2) the juvenile court clearly erred by finding that ADES proved abandonment; and (3) the juvenile court erred in finding that termination of Father's parental rights was in Jayden's best interest.

⁵ Father's opening brief's section heading also states that the juvenile court abused its discretion by denying his Rule 60(c) motion for relief from judgment. However, Father failed to further address this argument in his brief and we therefore consider the argument waived. *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening 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.") (citation omitted).

Jurisdiction

¶11 ADES preliminarily asserts that we lack jurisdiction to consider Father's claim that the juvenile court abused its discretion when it denied Father's Rule 60(c) motion because Father only appealed from the final judgment terminating his parental rights and not from the denial of his Rule 60(c) motion. We might agree with ADES if the court had ruled on the Rule 60(c) motion following the entry of judgment because, in that event, the court's ruling would have been separately appealable pursuant to A.R.S. § 12-2101(A)(2) (Supp. 2011) as a "special order made after final judgment." Here, however, although Father denominated his motion as one requesting relief pursuant to Rule 60(c), such motions are only proper to seek relief from a "*final* order, judgment, or proceeding[.]" (emphasis added). Because the final judgment was not entered until after the motion was ruled upon, Father's motion was in substance—even though not in form—a motion for reconsideration or new trial. See Ariz. R. Civ. P. 59(a)(1) (allowing a new trial to be granted due to "irregularity in the proceedings of the court . . . whereby the moving party was deprived of a fair trial"). Therefore, we have appellate jurisdiction over the court's denial of Father's motion as either an "intermediate order" pursuant to A.R.S. § 12-2102(A) (2003), or the denial of a motion for new trial under A.R.S. § 12-2102(B).

Proceeding in Absentia

¶12 On appeal, Father argues that the juvenile court erred by proceeding in his absence at the status conference. The record reflects that Father received a notice of hearing, pursuant to Arizona Rules of Procedure for the Juvenile Court (Rule) 64(C)⁶, in ADES's motion for termination of parent-child relationship. Further, the juvenile court properly provided Father with a Form 3 notice at the January 13, 2011 initial termination hearing as well as two subsequent hearings.⁷ Both Rule 64(C) and the Form 3 notice set forth the consequence of termination when a parent fails to appear at a pre-trial hearing. See *Adrian E. v. Ariz. Dep't Econ. Sec.*, 215 Ariz. 96, 99-101, ¶¶ 8-14, 158 P.3d 225, 228-30 (App. 2007) (parent received Form 3 notice and parent's subsequent absence at status conference authorized the juvenile court to sever parent's rights); see also Ariz. R.P. Juv. Ct. 65(C)(6)(c) and 66(D)(2). Thus, Rule 64(C) implicitly authorizes the juvenile court to convert a status conference into a termination hearing based on

⁶ Rule 64(C) states in relevant part:

the notice of hearing shall advise the parent . . . that failure to appear at the initial hearing, pretrial conference, status conference, or termination adjudication hearing, without good cause, may result in a finding that the parent . . . has waived legal rights, and is deemed to have admitted the allegations in the motion or petition for termination.

⁷ Father appeared telephonically at all three hearings.

the parent's failure to appear. *Manuel M. v. Ariz. Dep't Econ. Sec.*, 218 Ariz. 205, 209 n.5, ¶ 14, 181 P.3d 1126, 1130 n.5 (App. 2008).

¶13 In this case, the juvenile court provided Father with the Form 3 notice several times. The court notified Father of the scheduled August 22, 2011 hearing well in advance of the conference. Father failed to appear, and, as the court later noted, he failed to notify his attorney or the court of his impending absence. Father also failed to attempt to make alternative arrangements, such as requesting that the hearing be rescheduled. Because Father failed to appear, the juvenile court properly proceeded in Father's absence, pursuant to both the Arizona Rules of Procedure of the Juvenile Court and Arizona case law, with a termination hearing.

¶14 Further, Father's fundamental constitutional rights were protected as his attorney was allowed to fully participate in the hearing, cross-examine ADES's witness, make objections, and present a closing argument. See *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶¶ 7-8, 33, 303, 308, 173 P.3d 463, 467, 472 (App. 2007); see also *Manuel M.*, 218 Ariz. 205, 181 Ariz. 1133 (addressing requirements for a finding of waiver). Thus, the juvenile court did not error by proceeding against Father in absentia.

Abandonment

¶15 The juvenile court may terminate the parent-child relationship only upon finding that clear and convincing evidence demonstrates at least one statutory ground for severance and that a preponderance of the evidence shows severance is in the child's best interest. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We will affirm the judgment unless the juvenile court abused its discretion by making "factual findings [that] 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) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted).

¶16 Pursuant to A.R.S. § 8-533(B)(1), the juvenile court was authorized to terminate Father's rights upon a finding that Father abandoned the child. A.R.S. § 8-531(1) (2007) defines abandonment 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.

¶17 Abandonment is measured objectively by examining the parent's conduct, not subjective intent. *Michael J. v. Ariz. Dep't Econ. Sec.*, 196 Ariz. 246, 249-50, ¶ 18, 995 P.2d 682, 685-86 (2000); *Anonymous v. Anonymous*, 25 Ariz. App. 10, 12, 540 P.2d 741, 743 (1975). Father failed to maintain a normal parental relationship with Jayden without just cause for a period of time in excess of six months. A.R.S. § 8-531(1). Further, CPS supervisor Berhane testified that Father failed to participate in visitation services and the case plan offered to him. The record also demonstrates that Father additionally failed to provide financial support to Jayden, failed to maintain regular contact with her, and failed to provide Jayden with gifts, with the exception of one gift given to Jayden through Father's mother. Thus, Father's conduct of failing to support, stay in contact, or communicate with Jayden while she was in an out-of-home placement constitutes abandonment. See *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86 (abandonment is determined by the parent's conduct, including whether the parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship). The juvenile court therefore did not abuse its

discretion in denying relief to Father by not granting him a new trial. The evidence was clearly sufficient to support the court's finding that Father abandoned Jayden.

Best Interest

¶18 Father next argues the juvenile court erred in finding that it was in Jayden's best interest to terminate the parent-child relationship. In support of this ruling, the court found that terminating Father's parental rights would be in Jayden's best interest because she was adoptable, she "would be placed in a stable living and loving environment and that [] placement will be able to provide for [her] full array of needs; that the current placement wishes to adopt and should adoption not go forward, [she is] nonetheless adoptable."

¶19 In considering Jayden's best interest, the juvenile court was required to determine how Jayden would benefit from the severance or be harmed by the continuation of her relationship with Father. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Berhane testified that Jayden's current placement was meeting her needs, they were able to provide her with the appropriate support and stability she requires, and they expressed an interest in adopting her. Additionally, Berhane opined that termination and adoption were in Jayden's best interest. This evidence was sufficient to support the court's best-interest finding. *Audra*

T. v. Ariz. Dep't Econ. Sec., 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998). Thus, although Father expressed the desire to parent Jayden, we cannot say the juvenile court erred by finding that termination of his rights was in Jayden's best interest.

CONCLUSION

¶20 For the foregoing reasons, we affirm the judgment terminating Father's parental rights to Jayden.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge