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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RILEY F., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and AMBER B., Appellees.	2 CA-JV 2011-0079 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 14513700

Honorable Peter Hochuli, Judge Pro Tempore

AFFIRMED

Joan Spurney Caplan — Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff — Tucson
Attorneys for Appellee Arizona Department of Economic Security

Pima County Office of Children's Counsel
By Sara E. Lindenbaum — Tucson
Attorneys for Appellee Amber B.

E S P I N O S A, Judge.

¶1 Appellant Riley F., challenges the juvenile court's order terminating his parental rights to Amber B., born in February 2000, based on abandonment. *See* A.R.S. § 8-533(B)(1). For the reasons stated below, we affirm.

¶2 Riley, who apparently has never met Amber, was never married to Amber's mother.[1] The Arizona Department of Economic Security (ADES) removed Amber from the mother's custody in 2008 and filed a dependency petition. The petition, which alleged that Riley was Amber's putative father, was served personally on Riley in prison in September 2008. Amber was adjudicated dependent as to Riley in October 2008. The dependency was later dismissed and, although Amber was reunited with the mother in October 2010, ADES filed another dependency petition in December 2010. Riley was again served in prison with the 2010 dependency petition and with the subsequent motion to sever his parental rights. Amber was again adjudicated dependent as to Riley in March 2011.

¶3 Riley's attorney appeared on his behalf at the published severance/contested severance hearing in May 2011, his first actual appearance in this matter, and Riley himself appeared telephonically from prison at the contested severance hearing in July 2011. At that hearing, Riley claimed he had "never even heard of Amber" until three months before the hearing, and explained that he had written a letter to "the

[1]The mother, whose parental rights to Amber were terminated in April 2011, is not a party to this appeal.

case manager" after learning about Amber at that time.[2] Testimony at the severance hearing established that Amber had bonded with her placement family and did not want to have a relationship with Riley.

¶4 The juvenile court subsequently granted ADES's motion to terminate Riley's parental rights to Amber, finding ADES had proved the asserted ground of abandonment by clear and convincing evidence. The court noted that Riley had not registered as Amber's father with the Arizona Department of Health Services on its putative father registry, *see* A.R.S. § 8-106.01, and that Riley failed to maintain a normal parental relationship with Amber or provide reasonable support for her. *See* A.R.S. § 8-533(B)(1). The court also found by a preponderance of the evidence that severance was in Amber's best interest. A juvenile court may terminate a parent's rights if clear and convincing evidence establishes any one of the statutory grounds for termination set forth in § 8-533(B), *see* A.R.S. § 8-863(B); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d 682, 685, 687 (2000), and a preponderance of the evidence establishes that severing the parent's rights is in the child's best interests, *see* A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶5 On appeal, we view the evidence in the light most favorable to sustaining the court's ruling. *See Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686. "[W]e 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.*

[2]The attorney for ADES told the court he had received a letter from Riley after Riley had been served with notice of the 2011 severance hearing.

Ariz. Dep't of Econ. Sec., 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We will affirm the court's ruling "'unless we must say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.'" *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009), *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*).

¶6 Section 8-531(1), A.R.S., defines abandonment as

> the 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.

¶7 On appeal, Riley suggests this is a case of first impression in Arizona. Because his rights were severed based on abandonment when, he maintains, he did not know Amber existed and had no reason to believe he had fathered a child, he argues he could not have performed any acts necessary to maintain a normal parental relationship with Amber, asserting "[o]ne cannot abandon something one is not aware of." He also argues his lack of knowledge of Amber's existence constitutes just cause to excuse his failure to maintain a relationship with her.

¶8 Notably, the juvenile court had sufficient evidence to conclude Riley knew about Amber's existence. Moreover, even if he didn't know about Amber as a result of having been served with the dependency petition in 2008, pursuant to the putative father

registry statute, A.R.S. § 8-106.01(F), Riley was on notice of the pregnancy merely by having had sexual intercourse with Amber's mother. Riley nonetheless asserts that he was not a party to the 2010 dependency proceeding, and "had no knowledge at [the time of that proceeding] that he was the father of Amber B." The record shows, however, that Riley was personally served with notice of the initial dependency proceeding in September 2008, service that included notice of a scheduled hearing in this matter. In addition, the April 2009 progress report submitted to the juvenile court states that ADES had located Riley in prison, and that "[a] letter ha[d] been sent to him regarding the dependency action and he ha[d] not responded." At the severance hearing in July 2011, Riley nonetheless testified he had not "heard of Amber until . . . three month[s] ago."

¶9 On appeal, Riley argues this court should not consider that he was notified he might be Amber's father more than two years before the 2011 severance hearing. He contends ADES and Amber's attorney should not be permitted to assert this on appeal because they did not raise it below. We disagree for several reasons. First, because this information is part of the record in this case, it was properly before the juvenile court and is thus properly before this court, regardless of whether ADES or Amber's attorney expressly brought it to the court's attention. And, even if the juvenile court relied on this information, nothing in the record suggests that any such reliance was erroneous. *See Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (court of appeals will not disturb juvenile court's order severing parental rights unless factual findings are clearly erroneous).

¶10 Second, unlike cases where a party raises on appeal a wholly new issue not raised below, ADES and Amber's attorney have raised this issue to rebut Riley's argument on appeal that his parental rights were improperly severed based on abandonment because "he was unaware that he had fathered a daughter with Amber's mother" until February 2011. The record on appeal belies Riley's argument that "the evidence was uncontradicted . . . that [he] had no information at all that could have given him reason to believe that he had a daughter." We accordingly reject Riley's request that we refuse to consider opposing counsel's arguments on this issue.

¶11 Moreover, whether a parent has abandoned his child is a question of fact that must be decided by the juvenile court as the trier of fact. *Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686. And there is reasonable evidence in the record here that supports the court's finding that Riley had abandoned Amber, even if it did not consider that Riley had been placed on notice of Amber's existence years earlier. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. Put simply, the record establishes that Riley did not maintain a normal parental relationship with Amber and did not provide any meaningful support for her. Aside from having sent the letter to the attorney general, Riley failed to make any attempt to contact Amber in the years after he was personally served in 2008. A putative father must "do something, because conduct speaks louder than words or subjective intent." *Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1991); *see also In re Maricopa Cnty. Juv. Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994) (where unwed father "has reasonable grounds to

know that he might have fathered a child, he must protect his parental rights by investigating the possibility and acting appropriately on the information he uncovers").

¶12 Riley also argues the juvenile court should not have considered as a ground for termination his failure to register with the putative father's registry because ADES did not include this allegation either in the dependency petition or in the motion to terminate his parental rights. *See* A.R.S. § 8-533(B)(6). However, the transcript of the severance hearing and the signed minute entry ruling make it clear that, although considering that Riley failed to file or register on the putative father registry, the court terminated Riley's parental rights based solely on abandonment under A.R.S. § 8-533(B)(1). But we are unaware of any reason the court could not consider the fact that Riley had failed to register with the putative father's registry as part of its reasoning in determining whether or not to sever Riley's parental rights to Amber.

¶13 Section 8-106.01(A), A.R.S., requires any putative father seeking paternity who claims to be the father of a child to file a notice of a claim of paternity with the State Registrar of Vital Statistics in the Department of Health Services. Significantly, "[l]ack of knowledge of the pregnancy is not an acceptable reason for failure to file. The fact that the putative father had sexual intercourse with the mother is deemed to be notice to the putative father of the pregnancy." § 8-106.01(F). Here, the juvenile court appears to merely have made a factual finding in its written ruling that Riley had "failed to register with the putative father registry." In addition, based on the clear language of § 8-106.01(F), we decline to address Riley's argument that "the realities [of] contemporary

American culture" dictate that a man does not have a duty to determine if he has fathered a child as a result of a sexual relationship with a woman.

¶14 We again find instructive *Maricopa County*, a case where the father waited a full year after learning the child was his before raising the issue of paternity, and three years after he knew the child might be his. 179 Ariz. 102, 106-07, 876 P.2d at 1141-42. In that case, our supreme court concluded the father's obligation to act arose well before he knew the child was his, and noted that § 8-106.01 "drastically changes Arizona's adoption and termination statutes, [and] provides that lack of notice of the pregnancy and birth is not an acceptable reason for failing to assert parental rights." *Id.* at 106 n.6, 876 P.2d at 1141 n.6. We therefore conclude the court did not err in noting Riley had not registered pursuant to the statute.

¶15 For the reasons stated, we affirm the juvenile court's ruling terminating Riley's parental rights to Amber.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge