

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

FILED BY CLERK
NOV 13 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MALACHI W. and ARIZONA)
DEPARTMENT OF ECONOMIC)
SECURITY,)
Appellants,)

v.)

RICARDO M.,)
Appellee,)

2 CA-JV 2012-0064

ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY and MALACHI W.,)
Appellants,)

2 CA-JV 2012-0066
(Consolidated)
DEPARTMENT A

v.)

RICARDO M.,)
Appellee.)

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J192874

Honorable Susan Kettlewell, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Malachi W., born in June 2009, challenges the juvenile court’s order of May 11, 2012, denying the Arizona Department of Economic Security’s (ADES) motion to terminate the parental rights of his father, Ricardo M.¹ Malachi contends the court erred in its application of A.R.S. § 8-533(B)(8)(c), in concluding ADES had failed to establish that ground for severance by clear and convincing evidence, and in failing to conclude that severance was in his best interests. He urges this court to “find that ADES met its burden of proof in all aspects and terminate [Ricardo’s] parental rights.”

¶2 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, 684-85, 687 (2000), and a preponderance of the evidence establishes that severing the parent’s rights is in the child’s best interests, *see* § 8-533(B);

¹ADES also appealed the juvenile court’s decision but on appeal “agrees to adopt and be bound by the appellate positions, filings, representations, actions, and omissions of co-appellant Malachi W.”

Kent K. v. Bobby M., 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶3 Malachi was removed from his mother's home in November 2009 and placed with his maternal grandparents. The mother informed a child protective services (CPS) investigator that Ricardo M. was Malachi's father, but that he had not had contact with Malachi since he was two and a half months old. When the investigator contacted Ricardo, he reported that the mother and her family had "not allowed him to have visits with his child" and that "he did not want to argue with them so he stayed away." Malachi was adjudicated dependent as to Ricardo after Ricardo admitted the allegations in an amended dependency petition.

¶4 Pursuant to his case plan, Ricardo established his paternity of Malachi, underwent group and individual psychological evaluation and counseling, attended parenting classes and educational services, and obtained his high school diploma. The psychological evaluation showed Ricardo was "chronically immature and suffering from ADHD [(attention deficit hyperactivity disorder)]." Ricardo also completed a psychiatric evaluation as a result of his diagnosis. By April 2011, Ricardo had obtained a vehicle, driver license and automobile insurance and was employed, although his employment was irregular. He "participated appropriately and timely in his visitation with his son," including weekend and overnight visits.

¶5 In March 2011 Ricardo’s CPS case manager received a report that he had fathered another child with a different woman. Ricardo had not informed the case manager of the pregnancy. And by the summer of 2011 the case manager described Ricardo’s contact with her and his participation in his individual counseling and bonding and attachment counseling as “sporadic.” Two other service providers expressed concern about Ricardo’s ability to parent Malachi as well, and, in September 2011, ADES moved for termination of Ricardo’s parental rights.

¶6 By September Ricardo also had obtained his own apartment. But, by that time, overnight visitation with Malachi had been suspended as a result of Ricardo’s child and family therapist’s recommendation that he have time to work on his own issues.

¶7 Ricardo initially declined to engage in visitation with Malachi and the maternal grandparents, instead having “two hours supervised visitation by a case aid,” but in December 2011 began some “weekly visits supervised by the maternal grandparents.” As of March 2012, Ricardo had been employed at a Tucson restaurant for nine months. After a seven-day severance hearing, spanning November 2011 to March 2012, the trial court denied ADES’s motion to sever.

¶8 Malachi first contends the juvenile court “incorrectly interpreted A.R.S. § 8-533 . . . because it focused only on [Ricardo’s] ability to address the dependency petition allegations.” Section 8-533(B)(8)(c), the ground for severance alleged by ADES, requires that a child have been

in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order . . . , 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 and control in the near future.

As Malachi correctly points out, in determining whether a parent has remedied the circumstances causing the child to be placed in out-of-home care, we consider “those circumstances existing at the time of the severance that prevent a parent from being able to appropriately provide for his or her children.” *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 326, ¶ 22, 152 P.3d 1209, 1213 (App. 2007) (internal quotations and citations omitted).

¶9 Malachi points to the juvenile court’s comments in its ruling that Ricardo had benefited from the services provided “to address the issues that gave rise to the dependency” and that ADES had failed to establish he would “not be able to rectify the circumstances that brought Malachi into care within a reasonable period of time.” He maintains that these comments show “that the court focused solely on whether [Ricardo] had remedied the circumstances for removal highlighted in the initial dependency petition—namely [his] failure to provide financial support.” We disagree.

¶10 In addition to the portions of the ruling Malachi cites and Ricardo’s financial issues, the juvenile court also noted “[t]he prevailing concerns throughout the dependency,” including Ricardo’s immaturity and “limitations on absorbing and benefitting from information” provided in his classes. It also pointed out ADES’s allegations in support of its motion for severance—that Ricardo had “been unable to

benefit as much as he needs to be able to parent without considerable risk,” his failure to “achieve employment stability” and a home, and his general “thought process issues.” The court specifically noted that Ricardo had been “able to benefit from services that had been calculated to assist [him] in maintaining employment” because he had been holding a job for nine months. The court also noted that Ricardo had obtained his own residence, showing an “ability to gain from the counseling and other services provided to him.” The court also discussed at length Ricardo’s and Malachi’s counselors’ testimony about Ricardo’s ability to parent. In view of this extended discussion of the evidence presented by ADES and Ricardo’s achievements and struggles at the time of the severance hearing, we cannot say the court limited its evaluation of his progress to those issues present at the time of the dependency petition. Rather, in spite of the wording selected and relied upon by Malachi, it is clear from the totality of the court’s ruling that it considered the circumstances causing Malachi to be in court-ordered, out-of-home care at the time of the severance proceedings.

¶11 Malachi also maintains “the totality of evidence presented at trial evinces that [Ricardo] was unable to remedy the circumstances causing Malachi to remain in out-of-home care and that it was substantially likely [Ricardo] could not parent [him] in the near future.” Therefore, he argues, the juvenile court “erred in declining to sever [Ricardo’s] parental rights.” In support of this argument Malachi cites evidence presented at the severance hearing indicating Ricardo was not ready to parent and had made inadequate progress throughout the dependency. He discounts the contrary

evidence presented, which the court cited in its ruling, including Ricardo's having obtained employment and housing and having complied with his case plan requirements. This argument essentially invites us to reweigh the evidence presented, which we will not do. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). Reasonable evidence supports the court's decision and we cannot say that no one could reasonably conclude as it did. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). Thus, in view of the record before us, the court did not abuse its discretion in concluding ADES had failed to carry its burden to establish that severance was appropriate.

¶12 Finally, Malachi asserts "ADES proved by a preponderance of the evidence that termination of [Ricardo's] rights was in [his] best interests." But, because we conclude the juvenile court did not abuse its discretion in concluding ADES had not proven a ground for severance, we need not address whether severance is in Malachi's best interests. *See In re Pima Cnty. Juv. Severance Action No. S-120171*, 183 Ariz. 546, 549, 905 P.2d 555, 558 (App. 1995) ("[T]he best interest of a child alone cannot be the basis for severance"); *see also Kent K.*, 210 Ariz. 279, ¶¶ 36-38, 110 P.3d at 1021; *In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"), *quoting Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

¶13 The juvenile court did not abuse its discretion in denying ADES's petition to terminate Ricardo's parental rights. Accordingly, its order is affirmed.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.