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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BRIAN T. JR., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DIANA A., Appellees.	2 CA-JV 2012-0080 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. J19840800 and S199093

Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Two-year-old Brian T. appeals from the juvenile court's July 2012 order denying his petition to terminate the parental rights of his mother, Diana A. Brian challenges the juvenile court's conclusion that termination of Diana's rights would not be in his best interests, notwithstanding clear and convincing evidence that she had abused him or knew or should have known that someone else was abusing him, a statutory ground for termination of parental rights. *See* A.R.S. § 8-533(B)(2). For the following reasons, we affirm.

Background

¶2 In June 2011, the Arizona Department of Economic Security's (ADES's) Child Protective Services (CPS) division took temporary custody of Brian after Diana provided insufficient explanation for several injuries, including multiple fractures in different stages of healing, that the child had suffered while in her care or with caretakers chosen by her. ADES filed a dependency petition alleging that Diana had abused or neglected Brian and that his father, whose identity and whereabouts were uncertain at that time, had failed to protect him. In July, Jason S., Brian's father, admitted the allegations in an amended dependency petition; Diana did not contest the dependency.[1] The juvenile court affirmed the case plan goal of family reunification.

¶3 In August 2011, Brian's appointed counsel filed a petition to terminate Diana's parental rights. At a permanency hearing held on November 22, 2011, the

[1]Although the record indicates amendments to the dependency petition were read into the record and adopted by interlineation, only the original dependency petition is before us on review. Accordingly, we do not know the nature of the amendments or the scope of Jason's admissions.

juvenile court found "that the case plan goal of family reunification is appropriate and is clearly in the best interest of the child," that Diana was in partial compliance with her case plan, and that there was "good cause to extend the time to allow the parents an opportunity to remedy the circumstances that caused the child to be in an out of home placement." In February 2012, ADES placed Brian with Jason, with the court's approval.

¶4 After a contested termination hearing that began on December 1, 2011, and concluded on May 8, 2012, the court denied Brian's motion, finding he had established a ground for severance under § 8-533(B)(2) but had failed to show termination of Diana's parental rights was in his best interests. The court found that Diana had participated in and benefitted from her case plan services, with additional services recommended, and had been "observed at supervised visits to be a good parent" who had exhibited "excellent" parenting skills. Further, the court found Brian had been "observed at supervised visits to be very bonded to and comfortable with [Diana]." The court also noted the CPS case manager's testimony that Diana was "in compliance with the case plan, that visits had been appropriate and positive, that [Brian] is bonded to [Diana], . . . that [Brian's] best interests are to maintain a relationship with [Diana] and for the case plan to remain reunification[,]. . . [and] that severance of [Diana's] parental rights to [Brian] would neither remove a detriment nor result in a benefit for [him]."

Discussion

¶5 On appeal, Brian argues the juvenile court abused its discretion in concluding he had failed to establish, by a preponderance of the evidence, that termination was in his best interests, when it had also concluded, by clear and convincing evidence, that Diana had either abused Brian, causing him severe injuries, or knew or reasonably should have known that he was being abused by another. Relying on *In re Maricopa County Juvenile Action No. JS-500274*, 167 Ariz. 1, 804 P.2d 730 (1990), Brian asserts "severe physical abuse . . . in itself can be used to prove best interests" and, therefore, "it was an abuse of the Court's discretion to conclude that severance was not in [his] best interest." He also argues the court "gave undue weight" to certain testimony offered by the CPS case manager and visit supervisors and, presumably, insufficient weight to Brian's injuries and a psychologist's opinion that, at the time of Diana's psychological evaluation in early February 2012, Brian could not have been safely returned to her care.

¶6 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); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). To establish that termination is in a child's best interests, a petitioner must show how the child would benefit from termination or be harmed by the continuation of the parent-child

relationship. *Maricopa Cnty. No. JS-500274*, 167 Ariz. at 5, 804 P.2d at 734. The "immediate availability of an adoptive placement" is sufficient to support a finding of best interests, *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998), as is evidence that the child is merely adoptable, *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994). We have also recognized that "[i]n most cases, the presence of a statutory ground [for severance] will have a negative effect on the [child]." *In re Maricopa Cnty. Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988).

¶7 But in *Maricopa County. No. JS-500274*, our supreme court made clear that a finding of a statutory ground standing alone is insufficient to terminate a parent's rights; the severance also must be in the child's best interests. 167 Ariz. at 4, 804 P.2d at 733. In that case, a mother had petitioned to terminate the father's parental rights on the ground of abandonment in order to nominate her parents as guardians in her will and so that, in the event she married, her future husband would have the opportunity to adopt the child. *Id.* at 2-3, 804 P.2d at 731-32. Although the court assumed the statutory ground of abandonment had been proven, it reversed the juvenile court's termination order, finding any potential benefits to the child were merely speculative; because the mother had failed to establish any "present benefit" to the child resulting from termination, she had failed to sustain her burden of showing termination was in the child's best interests. *Id.* at 7-8, 804 P.2d at 736-37. The court noted this requirement reflects "an unspoken assumption that a parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing his natural parent." *Id.* at 6, 804 P.2d at 735. As examples

of how a child's best interests might be shown, the court suggested a "petitioner might prove that there is a current adoptive plan for the child or that the child will be freed from an abusive parent." *Id.*

¶8 Brian argues *Maricopa County. No. JS-500274* supports his contention that termination is in his best interests because "[t]he safety of [an] abused child . . . can only be guaranteed by ensuring that the child never has to be put at risk of further abuse by being in the abusive parent's care." He contends the juvenile court abused its discretion in concluding otherwise.

¶9 We agree that, in many circumstances, termination of an abusive parent's rights may be in a child's best interests. *See, e.g.*, *In re Pima Cnty. Juv. Action No. S-2462*, 162 Ariz. 536, 538-39, 785 P.2d 56, 58-59 (App. 1989) (best interests supported termination, notwithstanding absence of adoptive placement and reversal of father's conviction for murdering children's mother, where children placed in foster care as prelude to adoption and evidence showed father had abused them in past). But Brian's apparent argument—that finding abuse as a statutory ground for termination compels a finding of best interests in support of severance—eviscerates the principle, announced by our supreme court, that finding an enumerated ground for termination "cannot be equated with a finding of best interest" and a separate finding of best interests "is always necessary." *Maricopa Cnty. No. JS-500274*, 167 Ariz. at 5, 7, 804 P.2d at 734, 736. Similarly, § 8-533, in mandating that the juvenile court "shall also consider the best interests of the child" before terminating parental rights, provides no exceptions for particular enumerated grounds. Rather, a court may weigh all evidence relevant to

"whether the child's best interests would be served by termination." *Id.* at 8, 804 P.2d at 737. No single factor is determinative as a matter of law. *See Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, ¶ 11, 177 P.3d 327, 330 (App. 2008) (trier of fact "might ultimately conclude that severance would not be in the best interests of an adoptable child because of some other circumstances"). And, to the extent Brian suggests we reweigh the evidence on review, we will not do so. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002).

¶10 Viewing the evidence in the light most favorable to upholding the juvenile court's order, *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009), we cannot say the court abused its discretion in finding the evidence insufficient to support a best interests finding.[2] As Brian maintains, terminating Diana's parental rights would eliminate his contact with her and thereby eliminate the "risk of further abuse" by her or by inappropriate caregivers she has chosen in the past. But "termination of parental rights is not favored and . . . generally should be considered only as a last resort." *Maricopa Cnty. No. JS-500274*, 167 Ariz. at 4, 804 P.2d at 733.

[2]We emphasize that it is a petitioner's burden to affirmatively show a child's best interests would be served by severance of his parent's rights, *see Maricopa Cnty. No. JS-500274*, 167 Ariz. at 5-6, 804 P.2d at 734-35, and a juvenile court need not recite findings of fact when it concludes a petitioner has failed to sustain that burden, *see Ariz. Dep't. of Econ. Sec. v. Matthew L.,* 223 Ariz. 547, ¶ 10, 225 P.3d 604, 606-07 (App. 2010), *citing* A.R.S. § 8-538(A), (E). The relevant inquiry under these circumstances is whether a reasonable person could conclude, as the court did here, that the evidence was insufficient to support a finding of best interests. *Cf. Denise R.*, 221 Ariz. 92, ¶ 10, 210 P.3d at 1266 (termination order not reversed for insufficient evidence unless no reasonable fact-finder could find evidence satisfied applicable burden of proof).

¶11 Here, the juvenile court found that Brian appears bonded to Diana and comfortable with her and that Diana has exhibited some strong parenting skills that may yet improve with additional services. Moreover, as ADES points out, at this stage of these proceedings, it appears Brian has a parent—his father—who may be willing and able to protect him in the future. Indeed, the CPS case manager testified she did not believe terminating Diana's parental rights would benefit Brian or continuing the mother-child relationship would be detrimental to him because "we have a father, you know, [who]'s able to parent," mitigating the need for a severance.

Disposition

¶12 The juvenile court did not abuse its discretion in denying Brian's petition to terminate Diana's parental rights. Accordingly, we affirm its order.

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

CONCURRING:

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

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