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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DUANE H., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, ROBERT H., and ROMAINE H., Appellees.	2 CA-JV 2011-0005 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD200900071

Honorable Joseph R. Georgini, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Duane H. challenges the juvenile court's order appointing a permanent guardian for his sons, Robert H. and Romaine H., born in 2003 and 2005 respectively. Duane contends the court erred in appointing a guardian because there was insufficient evidence "to determine that permanent guardianship was in the best interest of the children" and because the Arizona Department of Economic Security (ADES) did not make reasonable efforts to reunify the family. For the reasons set forth below, we affirm.

¶2 Viewed in the light most favorable to sustaining the juvenile court's ruling, *see Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005), the evidence established that until 2006 Duane H. lived in Texas with Robert and Romaine and their mother, Geneva C.,[1] to whom Duane was not married. At that time, Geneva went to California to care for her terminally ill mother. Before her mother died, Duane sent the boys to California for a visit. After Geneva's mother died, Geneva and the boys moved to Arizona without Duane.

¶3 In 2008 and 2009, Child Protective Services (CPS), a division of ADES, received reports that Geneva was abusing the boys, was not caring for them properly, and was exposing them to domestic violence and drug abuse. The CPS caseworker assigned to the case contacted Duane about the reports, but he apparently took no action and CPS ultimately removed the children from Geneva's home and placed them in foster care. ADES filed a dependency petition in 2009 and Duane contested it. During a hearing on the petition, the court ordered Duane to submit to drug testing and he tested positive for marijuana. Because of the positive result, CPS requested that he take substance-abuse and parenting classes in Texas. Duane ultimately submitted to the dependency.

[1]Geneva has consented to the guardianship and is not a party to this appeal.

¶4 Meanwhile, ADES made a referral to Texas for a home study pursuant to the Interstate Compact on the Placement of Children (ICPC), A.R.S. §§ 8-548 through 8-548.07. Because Duane had a criminal history—including a conviction for possession of marijuana in April 2009, an arrest for credit card or debit card abuse in November 2009, and "a total of nine arrests in Texas dating back to 1994 for various offenses"—Texas refused ADES's request for a home study and stated Duane "would not be approved for placement." The children therefore could not be placed with Duane in Texas, and he indicated he was unwilling to move to Arizona. And, for various reasons, Duane was unable to complete the requested parenting classes and did not complete a substance-abuse class until sometime in November or December 2010.

¶5 ADES therefore filed a motion to appoint Robert and Romaine's foster mother, Betty J., as their permanent guardian. Duane contested the guardianship, arguing at a hearing on the matter that he "is a fit and proper parent, that CPS has no concerns with his parenting ability, that he has the home for the children to return to, that he has a school for the children to go to, [and] that he has the finances to support these children." He asked the court to defer ruling on the motion for guardianship until an ICPC investigation of his mother could be completed; she, too, lived in Texas. At a review hearing on the matter, the juvenile court granted the motion and appointed Betty J. as the children's permanent guardian. This appeal followed.

¶6 The party moving for the appointment of a permanent guardian "has the burden of proof by clear and convincing evidence." A.R.S. § 8-872(F). On review, we will affirm the juvenile court's order "'unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing.'" *Denise R. v. Ariz. Dep't*

of Econ. Sec., 221 Ariz. 92, ¶ 7, 210 P.3d 1263, 1265 (App. 2009), *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955). Section 8-871(A)(3), A.R.S., permits the juvenile court to establish a permanent guardianship for a child in ADES's custody if, inter alia, the guardianship is in the child's best interests and:

> [ADES] has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds that reunification efforts are not required by law or if reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child.

¶7 Duane first argues the juvenile court here "erroneously found . . . that appointment of a non-relative permanent guardian, rather than placement of the children in [his] care and control . . . was in their best interest." He points out that his CPS caseworker testified the children loved him and she had no concerns about placing the children with him. But, as Duane acknowledges, the caseworker also testified that she was unable to place the children with him because Texas had denied the ICPC request and that she felt it was in the children's best interests to make Betty J. their permanent guardian. Indeed, despite Duane's argument that he is a fit parent who would provide a suitable placement for the children and that the trial court should not have appointed a guardian for the children on that basis, under the ICPC the children cannot be placed with him because Texas has refused to approve him as a placement. *See* A.R.S. § 8-548; *Ariz. Dept. of Econ. Sec. v. Leonardo*, 200 Ariz. 74, ¶ 27, 22 P.3d 513, 522 (App. 2001).

¶8 Additionally, the caseworker testified that the children "have a very strong bond with [Betty J.] and they also have a very strong bond with their mother, who lives [in Arizona] and is able to see the children on a consistent basis." And, the caseworker

expressed concern about "moving the boys from what they know and where they're happy . . . to a home in Texas with grandma, who they don't know," even if Texas ultimately granted the ICPC request. Furthermore, as the juvenile court pointed out in its ruling, significant time had passed since the children had been with Duane and he had continued to test positive for marijuana use throughout the case. We cannot say that no one could reasonably find this evidence sufficient to establish that the guardianship was in the children's best interest, particularly because the children cannot be placed with Duane under the ICPC. We therefore must affirm the trial court's ruling. *See Denise R.*, 221 Ariz. 92, ¶ 7, 210 P.3d at 1265.

¶9 Duane also maintains that ADES "made no reasonable efforts to reunite" him with his children. But, a juvenile court may waive the requirement that ADES make reunification efforts if it finds that reunification "is not in the child's best interests because the parent is unwilling or unable to properly care for the child." § 8-871(A)(3). In this case we cannot say the juvenile court erred in finding that further efforts to reunify Duane and his children would be unproductive because "[a]n ICPC for father was denied due to his past criminal history" and he was "unwilling to relocate to Arizona."

¶10 This court has explained that "the ICPC [is] applicable to placement with parents whose rights have been terminated or diminished." *Leonardo*, 200 Ariz. 74, ¶ 27, 22 P.3d at 522. Thus, because the children here were dependent as to Duane and he had not established legal custody of them, placement with him is subject to ICPC. *Id.* ¶¶ 17, 21, 27. Because the children could not be placed with Duane in Texas and he was unwilling to move to Arizona, he was "unwilling or unable" to care for the children and

we cannot say the court erred in finding reunification services futile and ordering that "services should not continue."[2] § 8-871(A)(3).

¶11 For the reasons stated above, the order of the juvenile court establishing a permanent guardianship is affirmed.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

[2]Because we conclude the juvenile court's findings were correct on this basis, we need not address its suggestion that Duane was unwilling or unable to properly parent the children based on his drug use and the fact that "[t]oo much time ha[d] [e]lapsed" since the children had been in his care. Although the court suggested Texas's denial of placement under the ICPC would not prohibit placement with Duane in its ruling from the bench, its statement in its signed order, quoted above, suggests it reached a correct understanding of the ICPC.