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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL O., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, OLIVIA G., and DANIEL O., Appellees.	2 CA-JV 2008-0128 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18163700

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Jacqueline Rohr
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams
Tucson
Attorneys for Appellee Arizona Department of Economic Security

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P E L A N D E R, Chief Judge.

¶1 Daniel O. appeals from the juvenile court's order terminating his parental rights to his children, Daniel and Olivia, on grounds of mental illness, chronic substance abuse, and

length of time in care. *See* A.R.S. § 8-533(B)(3), (8)(a). He concedes the Arizona Department of Economic Security (ADES) proved at least one of these grounds by clear and convincing evidence and contests only the court's determination that termination was in the children's best interests.

¶2 We will not disturb the juvenile court's order "unless it is clearly erroneous," that is, no reasonable evidence supports the findings of fact upon which the order is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). On appeal, we view the evidence in the light most favorable to upholding the court's factual findings. *Jesus M.*, 203 Ariz. 278, ¶ 13, 53 P.3d at 207. To establish that terminating a parent's rights is in the children's best interests, ADES must prove by a preponderance of the evidence that the children "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004); *see also Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005). "The existence of a current adoptive plan is one well-recognized example of such a benefit." *Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d at 945; *see also James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 18, 972 P.2d 684, 689 (App. 1998); *In re Pima County Juv. Action No. S-2460*, 162 Ariz. 156, 158, 781 P.2d 634, 636 (App. 1989); *In re Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 243, 756 P.2d 335, 340 (App. 1988).

¶3 The trial court's determination that statutory grounds for termination existed was based on the following uncontested factual findings: Daniel had been diagnosed with polysubstance dependence, generalized anxiety disorder, depressive disorder, and antisocial

personality disorder; he had been offered appropriate services to address these issues, including counseling, parenting classes, substance abuse treatment, random urinalysis, and supervised visitation, but he had not fully participated in the services or demonstrated any benefit from them. At the time of the termination hearing, Daniel had not completed parenting or anger management classes or attended any individual therapy sessions. Further, he was not complying with the drug-screening protocol, and evidence was presented that, during the dependency proceeding, he had used his children to obtain drugs for himself.

¶4 The father's evaluating psychologist testified that "the family had been very unstable and the children had been subjected to a very chaotic and dysfunctional lifestyle." He opined that the children should not be returned to Daniel's care unless Daniel had achieved at least six to twelve months of sobriety. At the time of the termination hearing, the children had already been placed out of home for approximately fourteen months. The psychologist also testified that Daniel's anxiety and antisocial personality disorders could interfere with his ability to parent adequately and would likely continue for a prolonged period of time.

¶5 The juvenile court made the following findings regarding the children's best interests.

> The court . . . finds, by a preponderance of the evidence, that it is in the best interests of the minor children to grant the termination. Daniel is in a relative placement and that relative is a potential adoptive placement. Daniel is doing very well in this placement. He is not being neglected. He is not being used by his father to assist him in obtaining possession of illegal drugs. Olivia is in a licensed foster home that is willing to adopt her. Olivia has substantial special needs including blindness, autism, diabetes, and mild mental retardation. The current

> placement is able to provide the child with an appropriate school as well as the necessities of life that someone with her obvious disabilities requires. It would be a significant detriment to both children to deny the termination of parental rights and return them to a parent who is fundamentally incapable of parenting them and meeting their needs.

¶6 Daniel contests none of the juvenile court's factual findings, nor does he argue they were insufficient to support its best-interests determination. He contends only that the court abused its discretion by failing to consider the children's wishes that their father's parental rights not be terminated.[1] His argument is based entirely on statements the children's counsel made during closing argument. Counsel asked rhetorically whether the child Daniel wanted his father's parental rights terminated and then answered by stating: "No, he doesn't. He would prefer that he could go back to his father[,] but Daniel also understands why he can't and why where he is at is the most appropriate placement." Counsel elaborated that he could not "tell the Court today that as of this moment [Daniel] would consent to an adoption," that Daniel "kind of wants to wait and see what happens," but that Daniel likes where he is placed and is "living for the first time in a long, long time

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[1]In its answering brief, ADES interprets Daniel's argument as asserting a claim of ineffective assistance of the children's counsel. We do not read Daniel's opening brief as asserting such a claim. To the extent he attempted to do so, however, and assuming a claim of ineffective assistance of counsel can be raised in a proceeding for the termination of parental rights, *see In re Santa Cruz County Juv. Action Nos. JD-89-006 & JD-89-007*, 167 Ariz. 98, 101, 804 P.2d 827, 830 (App. 1990), Daniel has cited no authority showing he has standing to raise such a claim. Nor has he shown that counsel's failure to argue against termination affected the court's decision, given the uncontested facts of this case. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶¶ 17-18, 173 P.3d 1021, 1026 (App. 2007) ("[A]t a minimum," a parent must demonstrate that counsel's alleged ineffectiveness gave "rise to a reasonable probability that, but for counsel's errors, the result [of the termination proceeding] would have been different.").

a normal life." Counsel told the court he did not believe Olivia was equipped to make a choice about her living situation because, when asked, Olivia would respond that she wanted to live with her father but a few seconds later would state she wanted to remain with her foster family.

¶7 To the extent these comments conveyed the children's wishes that their father's rights not be terminated, we presume the juvenile court considered the comments in making its determination. Nothing in the record indicates the court did not weigh the appropriate factors in concluding that termination was in the children's best interests. *See State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997) ("'Trial judges are presumed to know the law and to apply it in making their decisions.'"), *quoting Walton v. Arizona*, 497 U.S. 639, 653 (1990); *see also Kent K.*, 210 Ariz. 279, ¶ 34, 110 P.3d at 1020 ("'[s]everance of parental rights necessarily involves the consideration of fundamental, often competing, interests of parent and child'"), *quoting Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 11, 995 P.2d 682, 684 (2000) (alteration in *Kent K.*). Therefore, we find no abuse of discretion in the court's ruling and affirm its order terminating Daniel's parental rights to his children.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge