

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DAVID I.,)	
)	
Appellant,)	2 CA-JV 2009-0014
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
ANGEL I.,)	
)	
Appellees.)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 15543700

Honorable Virginia Kelly, Judge

AFFIRMED

Sarah Michéle Martin

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings

Tucson
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Department of Economic Security

H O W A R D, Presiding Judge.

¶1 David I. appeals from the juvenile court’s order of January 28, 2009, terminating his parental rights to his son, Angel I., on grounds of David’s chronic substance

abuse and mental illness, *see* A.R.S. § 8-533(B)(3),¹ and his substantial neglect or willful refusal to rectify the circumstances that had caused Angel to remain in a court-ordered, out-of-home placement for longer than nine months, *see* § 8-533(B)(8)(a).² David challenges the sufficiency of the evidence to show by a preponderance that terminating his rights was in Angel’s best interests, and he contends he was denied due process by the state’s failure to provide appropriate remedial services designed to preserve the family.

¶2 Before it may terminate a parent’s rights, a juvenile court must find by clear and convincing evidence the existence of at least one statutory ground for severance and must find by a preponderance of the evidence that terminating the parent’s rights is in the child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, we “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. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). If sufficient evidence supports any one of the statutory grounds alleged for termination, we need not consider arguments pertaining to other grounds

¹To justify severance pursuant to § 8-533(B)(3), the state was required to prove in this case that David “is unable to discharge parental responsibilities because of mental illness . . . or a history of chronic abuse of dangerous drugs [or] controlled substances . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.”

²Termination of David’s parental rights pursuant to § 8-533(B)(8)(a) required proof that Angel had been cared for “in an out-of-home placement” pursuant to court order “for a cumulative period of nine months or longer,” during which time David had “substantially neglected or wilfully refused to remedy the circumstances that cause[d] the child to be in an out-of-home placement.”

alleged. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000).

Factual and Procedural Background

¶3 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 the following facts. David and his wife Arlene have been married for approximately twenty-seven years and are the parents of four children.³ When Angel was born in June 1996, his two older brothers were approximately nine and ten years old; his sister was approximately thirteen. Both David and Arlene have lengthy histories of substance abuse and addiction, and David has an extensive criminal history as well. The family had been the subject of a number of previous reports of child abuse and neglect between 1990 and 1996. The 1996 report coincided with Angel's birth, when tests revealed the presence of methadone and opiates in his system. He had experienced "significant delivery complications related to substance exposure" and suffered from "serious medical problems" as a newborn.

¶4 Over the next eleven years, the family remained intact, and Angel's three siblings reached adulthood. In November 2005, Arlene suffered a spinal cord injury that left her paraplegic; her recovery was long and medically complicated. By September 2007 Arlene could not care for herself independently; needed assistance with "bathing, dressing,

³The juvenile court simultaneously ordered Arlene's parental rights severed as well, and we have recently affirmed that order on appeal. *Arlene I. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2009-0009 (memorandum decision filed May 21, 2009).

and performing other personal care and household tasks”; and “require[d] skilled nursing [care,] as she [wa]s catheterized and ha[d] other critical medical needs.” In February 2007, Arlene and David’s daughter was shot and killed, an event that reportedly led both David and Arlene to relapse into their addictions to cocaine. And, shortly after their daughter’s death, their oldest son was sentenced to prison for murder.

¶5 The severance order David challenges on appeal was the culmination of a dependency proceeding the Arizona Department of Economic Security (ADES) initiated in September 2007. A year earlier, in August 2006, Child Protective Services (CPS) had become re-involved with the family, for reasons the CPS investigator described as follows:

[Arlene] had recently had an accident which left her paralyzed from the waist down and her recovery was very complicated and slow. She had a lot of medical issues, and Angel at that time was not in school, although school had started a few weeks before that. The house was infested with roaches, and Angel was sleeping on the floor next to the mother’s bed.

The father was abusing substances and was in and out of the home, and there were concerns by other social services and medical providers working with the mother at that time, because of the instability with the father in and out of the home and his erratic behavior because of substance abuse, that providers were afraid to provide services for the mother, which resulted in Angel carrying that load and caring for her and his needs being neglected. So we initially did an in-home service case and started monitoring the family pretty closely.

In the process, the investigator testified, CPS “tapped every possible resource [it] had” and “provided more for the family than most families are able to obtain” until February or March of 2007, when the family declined any further services. Because Angel by then was in school and there was no specific threat to his safety, CPS—“with great reluctance”—closed the case.

¶6 In mid-September 2007, however, CPS received a new report about the family. At that juncture, Angel again was not enrolled in school; both parents were abusing substances; Arlene was profoundly depressed; the police had been called repeatedly to investigate suspected substance abuse and domestic violence in the family; and their apartment was “dirty” and “absolutely infested” with roaches crawling everywhere. Because David was not dependably helping Arlene and there were no caregivers assisting the family at that particular point, eleven-year-old Angel “felt responsible for providing [his] mother’s care” and frequently slept on a blanket on the floor next to his mother’s bed.

¶7 CPS removed Angel from the home, and ADES filed the dependency petition in mid-September 2007. The following month, Angel’s parents failed to appear at a settlement conference. Consequently, they were deemed to have admitted the allegations in the dependency petition, and Angel was adjudicated dependent. The parents did attend the dependency disposition hearing, at which the juvenile court approved an initial case plan goal of family reunification and further approved the various rehabilitative services outlined in the case plan. At a permanency hearing in September 2008, the court ordered the case plan goal changed to severance and adoption, based on the parents’ “minimal progress with the case plan.” The contested termination hearing followed on December 9, 10, and 12, 2008.

¶8 The tasks David’s case plan required of him included the following: completing a substance abuse evaluation and complying with all resulting recommendations; abstaining from using drugs and alcohol; participating in random drug testing to verify abstinence; establishing and maintaining a drug-free lifestyle by “creat[ing] a support network of friends who are non-substance users” and “learn[ing] and demonstrat[ing] new

coping skills” in lieu of using drugs or alcohol; attending a full session of drug court; completing psychological testing and a psychiatric evaluation and following through with all resulting recommendations; completing and benefitting from an anger management program; attending all regularly scheduled visitations with Angel; providing “a stable and safe residence . . . free from health or safety hazards”; and “demonstrat[ing] a consistent, adequate, and legal source of income sufficient to provide for Angel’s basic needs.” Following a psychological evaluation, it was recommended that David obtain “intensive outpatient treatment for his substance-abuse issues,” participate in individual therapy, attend a self-help group like Narcotics Anonymous, and acquire parenting skills.

¶9 Dr. Michael German performed David’s psychological evaluation in May 2008. German’s diagnoses included heroin dependence, crack cocaine abuse, cannabis abuse, and prescription sedative abuse, all of which David claimed were in remission, and an antisocial and narcissistic personality disorder. Although David participated in a substance abuse assessment and the psychological evaluation, there is no evidence that he followed through on any of the referrals he received for substance-abuse treatment. He rarely called in as required for random drug testing and rarely submitted samples when told that testing was required.⁴ The single most critical task required of him—with his thirty-year history of addiction to heroin and abuse of other substances—was to achieve, maintain, and verify his sobriety, which he simply did not do.

⁴Between September 30, 2008, and the December 10 termination hearing, David submitted urine samples only twice, on September 30 and October 2. Although those test results were negative, David’s failures to call in or test at the various other times he was required to call and potentially test were deemed by ADES to be positive test results.

¶10 In ruling from the bench at the conclusion of the severance hearing, the juvenile court found that David had not utilized the services offered him during the dependency proceeding and had “never demonstrated remaining clean, participating in substance abuse counseling, addressing domestic violence issues through couples counseling, [or] parenting classes.” Parenting instruction, the court noted, was particularly “critical” for David “because, by his own statement, he hadn’t seen anything wrong with requiring Angel to stay home and take care of his mother.”

Issues and Discussion

¶11 We address David’s second issue first. He contends ADES violated his constitutional rights to due process by failing to make reasonable, good faith efforts to provide him with appropriate rehabilitative services as required both constitutionally in cases where the parent’s mental illness is asserted as a ground for termination, *see, e.g., Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶¶ 33-34, 971 P.2d 1046, 1053 (App. 1999), and by statute when termination is sought pursuant to § 8-533(B)(8) or (11). *See also* § 8-533(D). The state contends David has waived this constitutional claim by not having asserted it below.

¶12 “[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal.” *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000). But we may in our discretion address a constitutional issue that is first raised on appeal, *see Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008), and choose to do so here.

¶13 The juvenile court found on at least three occasions over the course of the dependency proceeding that the rehabilitative services ADES was offering David were necessary and appropriate and that ADES “ha[d] made reasonable efforts to accomplish reunification through the offering of [those services].” The record contains reasonable evidence to support those findings, and David did not object when they were made. Nor did he at any point request any additional services that ADES was not offering him.

¶14 David contends his due process rights were violated for two specific reasons. First, he asserts that, “[a]fter Angel’s removal from the home, [ADES] failed to provide parenting instruction or parent aide services which it had determined were necessary.” Second, he contends, “[he] was referred to Our Family for substance abuse treatment but was charged a fee for services, which he could not afford. [ADES] assured [David] that it would arrange for coverage but that never occurred.” However, David’s sole authority for the latter assertion is Arlene’s testimony at the termination hearing, which is ambiguous at best, coming as it did in response to a question whether David had ever assisted Arlene in trying to obtain treatment for *her* substance-abuse issues. It is thus debatable whether even Arlene’s testimony supports David’s assertion on appeal.

¶15 We are also not persuaded that David was denied due process because he was not offered parenting instruction or parent aide services, when he had not made any discernible effort to address his central, “critically important” problem, which was his decades-long drug addiction and substance abuse. Given that he was largely noncompliant with random drug testing throughout the entire dependency proceeding and, according to ADES, had failed to follow through on its repeated referrals for substance-abuse treatment,

we conclude the record supports the juvenile court’s findings that ADES had offered David appropriate remedial services but that he had not availed himself of those services or addressed the issues of “his severe prolonged mental illness, substance abuse, and criminal behaviors.”

¶16 David’s remaining issue on appeal is his claim that there was no “credible evidence” to support the juvenile court’s finding that terminating David’s parental rights was in Angel’s best interests. In particular, because Angel is nearly thirteen years old and has “significant behavioral issues,” David argues that he is not likely adoptable, despite two witnesses’ testimony—and the court’s finding—to the contrary. Further, David claims, because other evidence established that Angel has a relationship with his parents and cares about them, the harm to him from severing David’s parental rights would exceed any benefit he might realize from terminating the relationship.

¶17 Although a child’s potential adoptability is relevant to a juvenile court’s best-interests determination, it alone is not dispositive. *See Lawrence R. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 585, ¶¶ 8, 11, 177 P.3d 327, 329-30 (App. 2008). In determining whether severing a parent’s rights is in a child’s best interests, the court must consider whether the child will affirmatively benefit from the termination of the relationship or be harmed if it continues. *See In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-35 (1990); *Lawrence R.*, 217 Ariz. 585, ¶ 8, 177 P.3d at 329; *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). The burden of proof for best interests is by a preponderance. *Kent K.*, 210 Ariz. 279, ¶ 41, 110 P.3d at 1022.

well articulated by the juvenile court from the bench:

On the best interest issue, you have a child who still enjoys his parents' company, loves his parents in his way, his parents love him, and yet he's in a situation [in his foster placement] which was described by one of his therapists as providing him with some hope to break away from the poor adult behavior that he has seen modeled for him and to allow him to have a better future, and particularly the therapist referred to gang activity, the use of dangerous drugs, not going to school, loss of respect for women based on the therapist's belief perhaps the way he saw his mother treated in the home. All of these things are things that he still has a chance to improve upon so that his adult behavior is more appropriate and more likely to bring him success.

The therapist testified that the mother's and father's drug use, the domestic violence, had a profound effect on Angel, that the requirement that he had to provide care to his mother after her accident, particularly because it appears that he had to do that because his father's drug use interfered with the father doing this, that he was therefore isolated from school and friends and from sports, and because of this he became parentified.

He did not receive help with his own loss issues. He has lost a sister to murder, he has a brother in prison on a murder charge, and he has another brother raising a family I don't know very much about, but this child needs help dealing with those loss issues. And then during the trial there was also the description of what would have to create emotional trauma for the child, and that is watching his father bring another woman into the home after the mother was injured and having sex with her in the home and [Angel's] being aware of that.

He also still has problems expressing emotion. He is afraid that his response to anger will be outbursts that he recognizes will be inappropriate, and he has poor coping skills. He has a relatively good relationship with the foster parents. He's formed an attachment and trusts them. He's an adoptable child.

So for all of the above reasons, the Court finds that it is in the minor's best interest that the parents' rights be terminated and makes the finding by a preponderance of the evidence.

¶19 Based on the witnesses' testimony at the hearing and the exhibits admitted in evidence, the record contains reasonable evidence to sustain the juvenile court's factual findings, which in turn support its legal conclusions and termination order. *See generally Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (severance order upheld unless factual findings unsupported by any reasonable evidence and thus clearly erroneous). Finding no substantial merit to either of David's contentions on appeal, we affirm the juvenile court's order terminating his parental rights to Angel.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge