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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANDRE J.,) No. 1 CA-JV 12-0050
) 1 CA-JV 12-0051
 Appellant,) (Consolidated)
)
 v.) DEPARTMENT E
)
 ARIZONA DEPARTMENT OF ECONOMIC) **MEMORANDUM DECISION**
 SECURITY, A.M.,)
) (Not for Publication -
 Appellees.) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)

Appeal from the Superior Court in Maricopa County

Cause Nos. JD19098; JS11847

The Honorable Joan M. Sinclair, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Jamie R. Heller, Assistant Attorney General
Attorneys for Appellees

Denise L. Carroll Scottsdale
Attorney for Appellant

J O H N S E N, Judge

¶1 Andre J. appeals the superior court's orders finding his son, A.M., dependent and terminating Andre's parental rights to A.M. For the following reasons, we affirm both judgments.

FACTS AND PROCEDURAL BACKGROUND

¶12 A.M. was born out of wedlock to Andre and Tanikqua M. in 2003.¹ A.M. was almost three years old in 2006 when Andre was arrested and charged in California with conspiracy to commit robbery and conspiracy to prevent/dissuade a witness. Andre had his last in-person contact with A.M. around that time. He was incarcerated until he was convicted on the California charges, and was sentenced on February 6, 2009 to 15 years to life in prison.

¶13 At some point, A.M.'s maternal grandmother was appointed his guardian, and he was living off-and-on with his mother and his grandmother when his mother was arrested in April 2010. On April 28, 2010, the superior court granted the grandmother's request to revoke the guardianship, and Child Protective Services ("CPS") then took custody of A.M. The Arizona Department of Economic Security ("ADES") filed a dependency petition two days later, alleging A.M. was dependent as to Andre due to neglect.

¶14 It took some time to serve Andre in prison in California, and there were difficulties thereafter in arranging for him to appear by telephone for various hearings. ADES filed a petition for severance on August 19, 2011, and the court

¹ The juvenile court terminated Tanikqua's parental rights to A.M. on July 5, 2011. She is not party to this appeal.

scheduled the initial severance hearing for September 21, 2011. At that hearing, Andre's attorney advised the court that Andre would be released from prison within the next 30 to 60 days. The court set a combined dependency and severance hearing for February 27, 2012. It ordered Andre to appear in person at the hearing if he was not incarcerated. After Andre's attorney raised the possibility that he might be released on parole, the court ordered that Andre was to appear in person unless he was incarcerated or otherwise unable lawfully to appear.

¶15 Andre was paroled from the California prison on February 16, 2012. He did not appear in person for the February 27 hearing, but telephoned the court 37 minutes late for the proceeding. Andre explained he was not present in person because "my parole officer wants me to be - he actually wants me to give him a little bit of time before I just go to another state." His lawyer added that she had told Andre that he could appear telephonically. The court ruled Andre was in default. It recognized that a parolee might be able to travel out of state only with permission of his parole officer, but found that Andre had failed to ask his parole officer for permission to travel.²

² While Andre was testifying later in the hearing, his counsel asked him to describe the process by which he might have obtained permission to travel to Arizona for the hearing. He responded: "I would have to call them first, get them to okay

¶16 The hearing then commenced, and ADES called one witness, the CPS case manager, who testified Andre had not seen A.M. in nearly six years, had not provided any child support, did not send A.M. any cards, gifts or letters to CPS for A.M. despite being given notice that he could do so, and had not attempted to contact A.M. since his release from prison. The CPS case worker also testified A.M. was adoptable and termination of parental rights was in his best interests. She explained that severance and adoption would provide A.M. a responsible caregiver, a stable home and the possibility of reuniting him with his brothers.

¶17 After ADES rested its case, and notwithstanding having held Andre in "default," the court asked Andre's attorney if she had anything to present. Andre then took the stand and testified he maintained contact with A.M. through his mother, the child's grandmother. Andre admitted he had never paid child support, had never taken any steps to establish his paternity, did not know of A.M.'s living arrangements for well over a year and did not attempt to contact A.M. while the child was in CPS custody despite having received notice he could do so. Andre also testified it would be at least two to three months before

it, and send out a form to appear at certain things like this . . . and I guess the supervisor would have to agree to it or something . . . to that effect." His lawyer did not ask Andre what he had done to obtain leave to travel.

he could secure housing and employment. After Andre testified, the court offered him the opportunity to offer other evidence, but Andre called no other witnesses and offered no other evidence.

¶18 After hearing closing arguments by both sides, the court found that A.M. was dependent as to Andre based on neglect pursuant to Arizona Revised Statutes ("A.R.S.") section 8-844 (West 2012).³ The court also terminated Andre's parental rights based on abandonment and found the termination of Andre's parental rights was in A.M.'s best interests pursuant to A.R.S. § 8-533(A), (B) (West 2012).

DISCUSSION

A. Jurisdiction.

¶19 On March 14, 2012, the superior court entered a signed order finding A.M. dependent and a separate, unsigned order terminating Andre's parental rights. Andre filed separate notices of appeal of both orders the next day. The court filed its signed findings of fact and conclusions of law on the severance petition on April 3, 2012. Although Andre's appeal of the severance judgment was premature, we conclude we have jurisdiction because, after the unsigned order granting the motion for termination, "no decision of the court could change

³ Absent material revisions after the relevant date, we cite a statute's current version.

and the only remaining task [wa]s merely ministerial." *Craig v. Craig*, 227 Ariz. 105, 107, ¶ 13, 253 P.3d 624, 626 (2011) (quoting *Smith v. Ariz. Citizens Clean Election Comm'n*, 212 Ariz. 407, 415, ¶ 37, 132 P.3d 1187, 1195 (2006)). We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (West 2012), 12-120.21(A)(1) (West 2012) and 12-2101(A)(1) (West 2012).

B. The Superior Court's Finding that Andre Failed to Appear Without Good Cause.

¶10 Andre argues the court erred by ruling him in default after finding he failed to appear for the hearing without good cause.⁴

¶11 We review for an abuse of discretion a superior court's finding that a parent failed to show good cause for failing to appear. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007). To show good cause, the parent must show that "mistake, inadvertence, surprise or excusable neglect exists." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007). When a parent has waived his or her right to appear by being absent without good cause, the court may

⁴ Although the superior court may refer to a parent's failure to appear at a juvenile proceeding as a default, the court should "instead consider whether the parent can show 'good cause' as to why [he] failed to personally appear, and whether, under the circumstances, such failure should constitute a 'waiver of rights.'" *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 14, 173 P.3d 463, 468 (App. 2007).

preclude the parent from offering testimony or other evidence, but must allow him or her to remain in the courtroom, to testify to the best interests of the child and to cross-examine witnesses. *Id.* at 306, ¶ 24, 173 P.3d at 470.

¶12 We need not decide whether the superior court in this case abused its discretion by finding that Andre failed to demonstrate good cause for his failure to appear in person. Despite finding that Andre was in "default," the court allowed him to testify that he had not abandoned A.M. and gave him the opportunity to offer any other evidence. On appeal, Andre does not explain how he was prejudiced under the circumstances. On the record before us, we cannot conclude that Andre was prejudiced by the court's finding, and therefore decline to reverse the court's orders on this ground.

¶13 For the same reason, we cannot accept Andre's argument that the court deprived him of his due-process rights by failing to allow his attorney to participate in the severance proceedings after ruling Andre had failed to appear in person without good cause.

¶14 A parent who has waived his or her right to appear still has a constitutional right under the Due Process Clause to full participation by his or her counsel in a severance hearing. *Id.* at 307, ¶ 28, 173 P.3d at 471. Counsel under such circumstances must be permitted to review exhibits, make

objections to evidence and cross-examine witnesses. *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 283, ¶ 18, n.5, 237 P.3d 632, 636 (App. 2010).

¶15 The court in this case allowed Andre's attorney to do all of these things. Counsel objected to exhibits offered by ADES, cross-examined ADES's sole witness, offered Andre's testimony and made a closing argument. After Andre testified, the court asked his attorney if she had anything else and she said she did not. Andre has not identified any evidence or witnesses that the court prevented his attorney from presenting. Under the circumstances, the court did not violate Andre's due-process right to counsel.

C. The Record Supports the Court's Findings.

1. The order terminating Andre's parental rights.

¶16 Andre argues that no reasonable evidence supported the superior court's order terminating his parental rights. We view the facts in the light most favorable to sustaining the superior court's decision. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). "[W]e will 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." *Id.* at 280, ¶ 4, 53 P.3d at 205.

¶17 Before terminating a parent's rights, the superior court must find by clear and convincing evidence the existence of one of the statutory grounds set out in A.R.S. § 8-533(B). A.R.S. § 8-537(B) (West 2012). The court also must find by a preponderance of the evidence that termination is in the child's best interests. *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 453, ¶ 12, 123 P.3d 186, 189 (App. 2005).

¶18 Abandonment is defined as "the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." A.R.S. § 8-531(1) (West 2012). "[R]easonable support, regular contact, and normal supervision varies from case to case." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000).

¶19 Andre argues he offered evidence that he maintained some contact with A.M. He contends it was difficult to stay in touch from prison, and to illustrate his point, he cites difficulties he had in telephoning the court for hearings. But we will not reweigh the evidence considered by the superior court. See *Jesus M.*, 203 Ariz. at 282, ¶ 12, 53 P.3d at 207. According to the record, Andre had not seen A.M. in person in nearly six years, never provided any child support or established his paternity, did not send A.M. any cards, gifts or letters to CPS for A.M. despite knowing he could do so, and did

not know of A.M.'s whereabouts for over a year. While Andre argued he was in touch with A.M. through his own mother, he did not call her to testify. We conclude the record contains substantial evidence supporting the court's finding of abandonment.⁵

¶20 Although Andre correctly points out that imprisonment alone cannot justify severance on the ground of abandonment, incarceration may be considered as a factor. *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686 (citing *Pima County Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (App. 1980)). As recounted above, the court in this case properly considered other evidence in addition to Andre's incarceration.

¶21 Andre also argues the superior court erred by finding termination of Andre's parental rights was in the best interests of A.M. He does not cite any specific evidence in support of this contention, however.

⁵ Andre also contends that CPS did not provide him with services to help him reunite with his son. CPS has no duty to provide reunification services, however, when the ground for termination is abandonment. A.R.S. § 8-533(B) (West 2012); see also *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 64, ¶ 9, 993 P.2d 462, 465 (App. 1999). He further argues for the first time on appeal that the superior court erred by not rescheduling a mediation required by A.R.S. § 8-844(A) that he missed due to no fault of his own and by continuing hearings beyond the deadline set in A.R.S. § 8-842(C). See A.R.S. §§ 8-842(C), -844(A) (West 2012). Because Andre does not show how he suffered prejudice as a result of these alleged errors, we will not address these arguments. See *Maricopa County Juv. Action No. JD-4974*, 163 Ariz. 60, 63, 785 P.2d 1248, 1251 (App. 1990).

¶122 Proof of best interests requires evidence that the child will “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, 334, ¶ 6, 100 P.3d 943, 945 (App. 2004). An example of an affirmative benefit is an adoptive plan, even if not finalized, with the hope of providing a stable and nurturing home. *Id.* (citations omitted). The CPS case manager testified that A.M. was adoptable and discussed a plan of adoption with the possibility of reuniting A.M. with his brothers.

¶123 Reasonable evidence therefore supports the superior court’s finding that severance of Andre’s parental rights was in A.M.’s best interests.

2. Court’s finding of dependency.

¶124 Andre argues that no reasonable evidence supported the superior court’s finding that A.M. was dependent as to Andre due to neglect.⁶

¶125 We view the evidence in the light most favorable to sustaining the superior court’s findings and will not disturb a dependency adjudication unless no reasonable evidence supports

⁶ Andre also argues for the first time on appeal that the superior court failed to issue findings of dependency as required by A.R.S. § 8-844(C)(1)(a)(ii) (West 2012). We will not address this argument because it was not made to the superior court. See *Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App. 2007).

it. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). The primary consideration in any dependency action is always the child's best interests. *Id.*

¶126 Neglect is defined as: "The inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(22)(a) (West 2012). In addition to the evidence considered by the court in deciding to terminate Andre's parental rights, the record shows that at the time of the hearing, Andre lacked secure housing, did not have a job, has never had legal employment in his life and could not travel to Arizona without permission.

¶127 For all of these reasons, substantial evidence supported the superior court's finding of dependency based on neglect.⁷

⁷ Andre asks that we expand the holding of *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686 (court may not base a finding of abandonment in a severance hearing solely on evidence of incarceration) to dependency adjudications. Because the court in this case had evidence before it besides Andre's incarceration, we need not address this issue. See *id.* (incarceration can be one of other factors considered in severance adjudication hearing).

CONCLUSION

¶28 We affirm the superior court's dependency and parental termination orders.⁸

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
JON W. THOMPSON, Judge

⁸ We amend the caption in this appeal to refer to the child solely by his initials.