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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R.P. Juv. Ct. 103(G)



DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT D.,) No. 1 CA-JV 12-0146
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
SVETLANA G., E.D. and G.D.) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
Appellees.) ARCAP 28)
)

Appeal from the Superior Court in Maricopa County

Cause No. JS 11700

The Honorable Roger Hartsell, Judge *Pro Tempore*

AFFIRMED

Denise L. Carroll
Attorney for Appellant

Scottsdale

Ivy L. Kushner
Attorney for Appellees

Scottsdale

J O H N S E N, Judge

¶1 Robert D. ("Father") appeals the superior court's order terminating his parental rights to his two daughters. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Svetlana G. ("Mother") were married when their first daughter, E.D., was born in 2000. Mother was awarded sole custody of E.D. when Father and Mother divorced in 2004, and Father was allowed only supervised visitation because of his history of drug abuse. Father visited E.D. for an hour or two each month. He also was required to pay \$455.84 per month pursuant to a child support order, but as of the time of the severance hearing, he had made only one payment (in July 2004) of \$105.74.

¶3 Mother and Father reconciled in 2005, but Father continued to abuse cocaine and methamphetamine and would disappear for periods of time. The couple's second child, G.D., was born in 2006 and Father disappeared immediately thereafter.

¶4 Father participated in multiple rehabilitation programs from 2003 until 2008, but was unable to stay sober. He was on probation for possession of drug paraphernalia in March 2010 when he was convicted of theft of means of transportation and sentenced to three and a half years' imprisonment. While he was incarcerated, Father did not call or send the children any letters until Mother filed a private severance petition in September 2011. The superior court held a contested severance hearing in May 2012, at which Mother testified she was engaged to a man who provided for the children and wished to adopt them.

¶5 The superior court severed Father's parental rights based on abandonment, a felony conviction that proved unfitness as a parent, and his history of chronic drug abuse, pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1), (3), and (4) (West 2012).¹ The court further found severance was in the children's best interests because it would provide them stability and permanence with Mother and her fiancé. Father's timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (West 2012), 12-120.21(A)(1) (West 2012) and - 2101(A)(1), (B) (West 2012).

DISCUSSION

A. Legal Principles.

¶6 Before it may terminate a parent-child relationship, the superior court must find, by clear and convincing evidence, at least one of the statutory grounds enumerated in A.R.S. § 8-533(B). *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court also must find, by a preponderance of the evidence, that termination is in the best interests of the child. A.R.S. § 8-533(B).

¶7 On appeal, we view the evidence in the light most favorable to affirming the superior court's findings and will affirm a severance order unless it is clearly erroneous.

¹ Absent material revisions after the relevant date, we cite a statute's current version.

Michael J., 196 Ariz. at 250, ¶ 20, 995 P.2d at 686; *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). Because the superior court is in the best position to "weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings," we will accept its findings of fact unless no reasonable evidence supports them. *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.2d at 205.

B. Abandonment.

¶8 One of the statutory grounds for severance is that the parent "has abandoned" a child. A.R.S. § 8-533(B)(1).

"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. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1) (West 2012).

¶9 Father argues on appeal the court erred by finding he abandoned his daughters, and asserts he always has been a part of their lives and has bonded with them. But abandonment is not measured by subjective intent; it is measured by a parent's conduct and is a question of fact for the superior court to

decide. See *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990).

¶10 The record contains evidence that both before and during his incarceration, Father failed to make more than minimal efforts to support and communicate with his children. See *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. He was incarcerated in 2009, but did not call or send any letters until after the termination proceedings began in 2011.² He wrote one letter to E.D. at that time, to which E.D. responded, saying she wanted no further contact with him. Father also did not send the children any gifts until after the initiation of the termination proceedings.

¶11 Father correctly asserts that his incarceration alone cannot justify severance on grounds of abandonment. See *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686. But even when "circumstances prevent the . . . father from exercising traditional methods of bonding with his child, he must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent

² Although Father maintains he sent letters every month, sufficient evidence supports the superior court's finding that Father's testimony was exaggerated. Mother testified Father sent no letters or cards other than one to E.D. after Mother initiated the termination proceedings. Father acknowledged he did not receive any responses to the letters Mother denies he sent, and admitted he received a response from E.D. only to the one letter Mother admits receiving.

necessary." *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994). Based on the evidence before the court, Father took no action to maintain a normal relationship with E.D. and G.D. until his legal rights to the children were challenged.

¶12 Additionally, the evidence was sufficient for the superior court to conclude that Father showed little interest in his children even prior to his incarceration. Since his divorce from Mother in 2004, Father made only one token child-support payment. *Maricopa County Juv. Action No. JS-3594*, 133 Ariz. 582, 586, 653 P.2d 39, 43 (App. 1982) (failure to provide child support is "a factor to be considered and, when coupled with a failure to communicate or the absence of sending gifts, is sufficient to uphold a conclusion that the child has been abandoned"). Mother testified that even when they lived together, she was the sole provider and Father used his earnings for his own needs, including supporting his drug use.

¶13 Father asserts that before he was incarcerated, he went to the children's doctors' appointments and parent-teacher conferences and took E.D. fishing. But Mother testified he spent little time with the girls and would miss significant events in their lives when he left for weeks at a time while he was using drugs. Although Father argues he explained his conduct, we defer to the superior court's findings that Father

was "completely lacking in credibility as a witness" and "vigorously overstated his relationship with the children." See *In re James P.*, 214 Ariz. 420, 425, ¶ 24, 153 P.3d 1049, 1054 (App. 2007) (superior court is in best position to assess witness credibility).

¶14 In sum, reasonable evidence supported the court's finding that Father abandoned his children. See *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.2d at 205.³

C. Best Interests.

¶15 Father also argues the superior court erred in finding that severance would be in E.D. and G.D.'s best interests. See A.R.S. § 8-533(B). The court will not "assume that a child will benefit from a termination simply because he has been abandoned"; it must be shown that termination benefits the child or prevents the continuation of a harmful relationship. *Maricopa County Juv. Act. No. JS-500274*, 167 Ariz. at 5-6, 804 P.2d at 734-35.

¶16 Our review of the record reveals that the superior court's determination is supported by a preponderance of the evidence. See *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, 587, ¶ 7, 177 P.3d 327, 329 (App. 2008). Although

³ In light of this conclusion, we need not examine whether the court erred by concluding termination also was appropriate on other grounds. See A.R.S. § 8-533(B) (termination warranted if any of listed circumstances exists).

Father contends the children would suffer "no consequence" if he maintained his parental relationship, the court found that the children would be harmed by continuing the relationship. Mother testified the children suffered during the time periods when Father returned to the family and purported to try to stay sober, and she also testified E.D. has improved in school since Father was incarcerated.

¶17 Father testified he no longer has a drug problem but the superior court found Father "completely minimized his illicit drug usage." He overdosed in 2005, used drugs while babysitting E.D., could not remain sober while on probation from 2007 until his current imprisonment and, according to the presentence report issued prior to his most recent conviction, marginalized his children relative to his drug use. Father admitted his drug abuse is not in the best interests of the children and it affected his family life. Additionally, Father disappeared often, failed to communicate with the children and provided no financial or emotional support for them, and Mother claimed he even stole money from their piggybanks.

¶18 In short, the evidence before the court supports its finding that Father has no awareness of the children's needs and that terminating his relationship with them will prevent harmful disruption in their lives caused by his drug abuse.

CONCLUSION

¶19 For the foregoing reasons, we affirm the severance of Father's parental rights as to E.D. and G.D.⁴

/S/

DIANE M. JOHNSEN, Judge

CONCURRING:

/S/

JOHN C. GEMMILL, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge

⁴ The caption in this appeal is amended to refer to the children by their initials.