DIVISION ONE
FILED: 04/02/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JERMAIN S.,	)	No. 1 CA-JV 12-0178
	)	
Appellant,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, T.M.,	)	103(G) Ariz. R.P. Juv. Ct.; Rule 28 ARCAP)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JD18762

The Honorable Jo Lynn Gentry-Lewis, Judge

AFFIRMED

David W. Bell — Mesa
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General — Phoenix
by Jamie R. Heller, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

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S W A N N, Judge

¶1 Jermain S. ("Father") appeals the juvenile court's order terminating his parental rights to T.M. ("Daughter").[1] Reasonable evidence supports the order, and we therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2003, Father began a relationship with Daughter's mother ("Mother") that he described as "purely sexual." Daughter was born on September 5, 2007. Mother had not informed Father that she was pregnant, and he did not find out about Daughter's birth until she was a year old. At the time of the contested-severance hearing, Father still did not know where or when Daughter was born. Upon finding out about Daughter, Father did not attempt to obtain custody of Daughter, pay monthly child support, or get a paternity test. Father's name is not on Daughter's birth certificate.

¶3 In January 2010, Child Protective Services ("CPS") received a report that Mother's boyfriend had been physically abusive towards Daughter and her two siblings.[2] CPS also found that Father had "neglect[ed] and abandoned his daughter by not providing the proper and basic support and by not protecting [Daughter] over the past year." CPS placed all three children in foster care.

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[1] The caption has been amended to safeguard the identity of the juvenile pursuant to Administrative Order 2013-0001.

[2] Daughter's siblings each have different biological fathers from Daughter.

¶4 On January 14, 2010, the Arizona Department of Economic Security ("ADES") filed a dependency petition claiming that Mother was unable to care for her children, and that Father's whereabouts were unknown.[3] On January 26, 2010, Father appeared at a preliminary protective hearing conference during which the court set the date and time for the dependency hearing.

¶5 On March 23, 2010, Father failed to appear at the dependency hearing. The court therefore found that Father "waived his right to contest the allegations contained in the petition[,]" and found Daughter dependent as to Father. The court ordered that a paternity test was necessary to identify Daughter's biological father. The court also determined that the case plan was family reunification and that ADES would offer Father various services, including "paternity testing and any other services deemed necessary[.]" On April 13, 2010, Father took a paternity test and was proven to be Daughter's biological father. ADES then provided Father with various reunification services, including visitations with Daughter and a parent aide,

[3] On February 28, 2012, Mother knowingly, intelligently, and voluntarily waived her right to trial, and did not contest the severance.

a psychological consultation, a psychological evaluation, a bonding assessment, and drug testing.[4]

¶6 Father initially complied with ADES's reunification services. He completed a psychological consultation with Dr. Menendez and subsequently a psychological evaluation with Dr. Bluth. Father was also consistent in attending his parent-aide sessions, and the notes from these sessions stated that Father was "making progress toward his goals." Further, Father appeared to have a bond with Daughter during one-on-one sessions.

¶7 However, ADES eventually began to express many concerns regarding Father's participation in various services. First, Father missed 30 out of 73 scheduled visits with Daughter. Second, Father was required to complete three urinanalysis tests, but he only completed two. Third, Father failed to make a self-referral for counseling for many months. Fourth, during his psychological evaluation with Dr. Bluth, Father failed to disclose various matters that concerned ADES.[5]

[4] Although Father has never been convicted for drug use, Father did serve time in a correctional facility in Los Angeles for importing marijuana.

[5] Father did not disclose that he still has a relationship with Daughter's maternal grandparents, even though he was told that they were not safe for Daughter to be around. Further, there was a recent police report stating that Father had allegedly allowed a child to watch pornography, and Father's girlfriend

Fifth, in October 2011, Dr. Bluth conducted a psychological reevaluation on Father and diagnosed Father with unspecified substance abuse, antisocial personality disorder, and parent-child relational problems. Dr. Bluth therefore concluded that "[t]here is a substantial likelihood that father will not be capable of exercising proper and effective parental care and control in the near future," so Father "would not be able to parent successfully in the foreseeable future." Lastly, another doctor, Dr. Moe, conducted a psychological consultation in which he reviewed Father's prior psychological evaluations and other reports to determine if visitation with Father was in Daughter's best interests. Dr. Moe concluded that Daughter demonstrated troubling behavior following her visits with Father, including that she: gave indications that she did not like having visitation with Father; had difficulty sleeping for days following the visits; suffered from increased anxiety; and was very clingy to her foster mother.

¶8 In January 2012, ADES changed Daughter's case plan to severance and adoption. On February 7, 2012, ADES filed a motion to terminate the relationship between Father and Daughter. At a two-day trial, in May 2012, ADES presented evidence of the facts set forth above, and ADES further argued

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obtained a restraining order against him due to fear of physical harm.

that terminating Daughter's relationship with Father would be in her best interests because she was in a foster home that was committed to adopting her.

¶9 On July 18, 2012, the juvenile court terminated Father's relationship with Daughter.[6] Father timely appeals. We have jurisdiction under A.R.S. § 8-235(A).

STANDARD OF REVIEW

¶10 Because the juvenile court is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings, we accept the juvenile court's findings of fact unless no reasonable evidence supports them. *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 234, ¶ 13, 256 P.3d 628, 631 (App. 2011). The juvenile court's decision about the weight and effect of evidence will not be disturbed unless it is clearly erroneous. *Maricopa Cnty. Juv. Action No. JD-6123*, 191 Ariz. 384, 388, 956 P.2d 511, 515 (App. 1997).

[6] The court found that Daughter had been in an out-of-home placement for a cumulative total period of at least fifteen months; Father did not fully participate in ADES services; Father did not complete three rule-out urinalysis tests, which were required because of his criminal history pertaining to marijuana; during a psychological evaluation, Father admitted to using marijuana; Father missed 30 supervised visits with Daughter; Father did not know that Daughter was exposed to domestic violence when living with her mother; and Father's girlfriend made allegations of domestic violence against him.

DISCUSSION

I. SUFFICIENT EVIDENCE EXISTED TO SUPPORT THE JUVENILE COURT'S FINDINGS THAT ADES PROVIDED ADEQUATE REUNIFICATION SERVICES, AND THE COURT DID NOT ERR BY FINDING THAT THE TERMINATION OF FATHER AND DAUGHTER'S RELATIONSHIP WAS IN DAUGHTER'S BEST INTERESTS.

¶11 To terminate parental rights, a juvenile court must first find by clear and convincing evidence the existence of at least one statutory ground for termination. *See* A.R.S. § 8–533(B); Ariz. R.P. Juv. Ct. 66(C). Clear and convincing evidence is that which makes the alleged facts highly probable or reasonably certain. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93, ¶ 2, 210 P.3d 1263, 1264 (App. 2009). We will not reverse a termination order unless it is clearly erroneous. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). The court must also find by a preponderance of the evidence that the termination is in the best interests of the child. A.R.S. § 8–533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶12 A.R.S. § 8-533(B)(8) provides that termination of the parent-child relationship is warranted when:

> [T]he child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, . . . the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and . . . one of the following circumstances exists:
>
> . . .

> (c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to § 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

¶13 While the state must demonstrate reasonable efforts at reunification, ADES "is not required to provide every conceivable service or to ensure that a parent participates in each service it offers." *Maricopa Cnty. Juv. Action No. JS–501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). And, ADES is not required to provide services that are futile. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 18, 83 P.3d 43, 50 (App. 2004). To demonstrate reasonable efforts at reunification, ADES must provide the parent "with the time and opportunity to participate in programs designed to help her become an effective parent[.]" *JS–501904*, 180 Ariz. at 353, 884 P.2d at 239. The court must find that ADES made a diligent effort to provide such services. *Christina G.*, 227 Ariz. at 235, ¶ 14, 256 P.3d at 632 (citing A.R.S. § 8–533(B)(8), (D)).

¶14 In support of his contention that ADES failed to exercise diligent efforts to provide adequate reunification services, Father points to ADES's failure to accommodate his work schedule when scheduling visits with Daughter. Also,

Father claims that ADES never responded to his e-mails regarding scheduling urine analysis appointments and visitation.

¶15 However, the court received testimony at the contested-severance hearing that ADES attempted to accommodate Father by meeting at the location of his choice. But Father did not attend multiple appointments because "his work schedule is never the same day to day." It was not ADES's responsibility to attempt to predict Father's work schedule -- it was Father's responsibility to vigorously attempt to become a parent to his child. Father did not regularly communicate his needs to ADES. Further, even if Father missed some visits with Daughter due to a work conflict, he fails to provide an adequate explanation as to how he missed all 30 visits.

¶16 Although Father contends that ADES did not answer his e-mails regarding scheduling urinalysis appointments and visitation, Father failed to bring the e-mails with him to the contested-severance hearing. Father also does not dispute that he received numerous other services from ADES. We therefore conclude that the juvenile court did not err by finding that ADES adequately provided reunification services.

¶17 In this case, Daughter has been in an out-of-home placement since January 8, 2010, which is a period of more than fifteen months. Daughter is in a stable home living with her two siblings, is provided for financially, and her foster family

is committed to adopting her. We therefore conclude that the juvenile court did not err by finding that terminating the relationship with Father was in Daughter's best interests.

II. FATHER'S DUE PROCESS WAS NOT VIOLATED AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

¶18 Father contends that he was denied due process because his counsel failed to 1) file a list of witnesses and exhibits; 2) call as a witness any of the authors of the various reports received into evidence; 3) make timely objections to the admission of hearsay evidence contained in the admitted exhibits; and 4) seek admission of Father's evidence contained in e-mail communications that documented and supported Father's valid rebuttal to the state's claims.

¶19 We disagree. To prevail on an ineffective assistance claim, a party must show that 1) "the representation fell below prevailing professional norms"; and 2) the deficient representation prejudiced the party. *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 323, ¶ 8, 173 P.3d 1021, 1024 (App. 2007). To show prejudice, a parent must at a minimum "demonstrate that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *Id.* at 325, ¶ 18, 173 P.3d at 1026 (citations omitted).

¶20 Father fails on each of his claims to demonstrate how he was prejudiced by his legal representation.

A. Failure To File a List of Witnesses and Exhibits, and Failure To Call as Witnesses Authors of Various Reports

¶21 Father contends that because his counsel failed to file a list of witnesses and consequently did not call the authors of the parent-aide reports, who would testify that he successfully completed parent-aide requirements, he was prejudiced by his attorney. Further, Father "was denied his right to face his accusers." Therefore, he contends that the judge "did not get to hear from favorable witnesses that should have been subpoenaed to appear."

¶22 But Father does not explain how he was prejudiced by his representation. The court received multiple reports from ADES that revealed that he consistently participated in the parent aide program and was initially making progress toward his goal of reunification with Daughter. Father fails to specify how the testimony of any additional witnesses would have given rise to reasonable probability that a different result would have occurred in the case. Therefore, we conclude that Father did not suffer prejudice due to the absence of additional witness testimony.

B. Failure To Make Timely Objections to the Admission of Hearsay Evidence Contained in the Admitted Exhibits

¶23 Father next contends that his due process rights were violated when his attorney did not timely object to the admission of exhibits that contained hearsay evidence. But he fails to specifically identify what hearsay was inadmissibly admitted and how the admission of the hearsay would have changed the result in this case. Father has not shown that he has suffered prejudice as a result of his legal representation.

C. Failure To Seek Admission of Father's Evidence Contained in E-mail Communications That Documented and Supported Father's Rebuttal

¶24 Finally, Father contends that his due process rights were violated because his attorney did not admit e-mail communications that would have allowed different sources to corroborate or substantiate his testimony. But Father effectively concedes that he testified on all of the evidence contained in the e-mail communications. We cannot conclude that there would have been a reasonable probability of a different result had his testimony been corroborated by copies of the relevant e-mails.

¶25 Because Father has not demonstrated that he suffered prejudice as a result of his representation, we conclude that the juvenile court did not err by finding that Father's due process was not violated.

CONCLUSION

¶26 For the foregoing reasons, we affirm the termination of Father's relationship with Daughter.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge*

*The Honorable Daniel A. Barker, Judge (Retired) of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).