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



DIVISION ONE
FILED: 2/7/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM M.,) No. 1 CA-JV 12-0194
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct.
SECURITY, A. M., L. M.,) 103(G); ARCAP 28)
)
Appellees.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD19077 & JS11915

The Honorable Roger L. Hartsell, Judge *Pro Tempore*

AFFIRMED

Robert D. Rosanelli Attorney at Law Phoenix
By Robert D. Rosanelli
Attorney for Plaintiff/Appellant

Thomas C. Horne, Arizona Attorney General Phoenix
By Nicholas Chapman-Hushek, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

B R O W N, Judge

¶1 William M. ("Father") appeals the juvenile court's order terminating his parental rights to his daughter and son. For the following reasons, we affirm.

BACKGROUND

¶12 Father and Brandy L. ("Mother") are the unmarried, biological parents of A.M., born January 2011, and L.M., born January 2012.¹ Mother has two other children, H. and L., born October 2007 and May 2009 respectively; Father is not the biological or legal father of either H. or L. Father and Mother met at a Crystal Meth Anonymous function and, along with Mother's two older children, began living together in the latter part of 2009. Father has a long history of substance abuse that includes the use of mescaline, peyote, cocaine, methamphetamines ("meth"), marijuana, and synthetic bath salts.

¶13 Given concerns about domestic violence and substance abuse, in April 2010, the Arizona Department of Economic Security ("ADES") filed a dependency petition against Mother as to H. and L. and asked that the matter be treated as an in-home intervention. See Ariz. R.P. Juv. Ct. 48.1. Although Father was not a party to this in-home intervention (because he is not the father of either H. or L.), he participated in services ADES offered him because he was living in the home.

¶14 The court allowed the matter to proceed as an in-home intervention for a time. However, in June 2010, H. and L. were

¹ On the court's own motion, it is hereby ordered amending the caption for this appeal to protect the identity of the minor children. The above referenced caption shall be used on all documents filed in this appeal.

removed from Mother's physical custody based on reports of continued domestic violence and Father's relapse on meth and those children were found dependant as to Mother in July 2010. ADES continued to provide reunification services, including parent aide, random drug testing, supervised visitations, counseling, and assistance with parenting skills. Father and Mother both substantially complied with the provided services and H. and L. were returned to Mother's physical custody in April 2011.² The juvenile court dismissed that dependency in September, 2011.

¶15 About a week later, H. told her grandparents that Father had sexually abused her. A police detective interviewed H. and ADES removed the children (H., L., and A.M.) from the home on November 11, 2011. ADES then filed a dependency petition alleging the children were dependent due to the parents' abuse/neglect, domestic violence, a history of substance abuse, and mental illness.

¶16 At the preliminary protective hearing, Father indicated he was no longer abusing drugs and did not need any treatment services. Based on his assertions, the court did not direct ADES to provide Father substance abuse services.

² In January 2011, Mother gave birth to A.M., but she was not removed from the home at that time. Mother's parental rights are not at issue in this appeal.

Consequently, ADES provided only visitation services; it also requested, however, that Father and Mother cooperate with the police investigation of H.'s sexual abuse allegations. Because Father and Mother declined to discuss the allegations with the police, ADES continued the out-of-home dependency to ensure the safety and stability of the children.

¶17 On December 6, 2011, as relevant here, ADES filed a petition for termination of Father's parental rights to A.M., alleging he willfully abused a child pursuant to Arizona Revised Statutes ("A.R.S") section 8-533(B)(2) (2012).³ In March 2012, ADES filed a dependency petition as to L.M., who was born in January 2012, and a petition for termination, alleging that severance of parental rights to L.M. was justified on the same grounds as the petition relating to A.M. The impetus for ADES's petitions relating to L.M. was Father and Mother's non-compliance with a safety plan previously put in place.

¶18 Over the course of four days in May and June 2012, the juvenile court held a concurrent dependency/severance hearing. ADES presented the testimony of Mother's father, Mother, Father, a police detective, a therapist, and ADES case managers. On the first day of the hearing, ADES called Father as a witness. Father, age 29 at the time, testified he had been dealing with

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

substance abuse issues for over ten years. Father testified that, during the first dependency, he stayed sober for approximately seventeen months, but relapsed when he was accused of sexually abusing H. His relapse included the consumption of alcohol, meth, and marijuana. Father also admitted he had not fully disclosed this substance abuse to his case workers or the court during the second dependency. He testified, however, that he voluntarily checked himself into an in-patient drug treatment program for 35 days in March-April 2012 at his own expense. As a result of Father's testimony during this hearing, ADES again began to offer him substance abuse services, including random urinalysis tests and counseling. However, Father failed to fully comply with these services.

¶19 Prior to closing arguments, ADES moved to amend its petition for termination to add additional grounds: six months' time-in-care pursuant to A.R.S. § 8-533(B)(8)(b) (for A.M.) and substance abuse and mental illness pursuant to A.R.S. § 8-533(B)(3) (for both A.M. and L.M.). Father and Mother both objected to the proposed amendment, and the court took the matter under advisement along with the merits of the petitions. In August 2012, the juvenile court issued its ruling allowing ADES to amend the termination petition except for the mental illness ground; granting ADES' petitions and, as applicable here, terminating Father's parental rights to A.M. and L.M. The

court found ADES had proven all three severance grounds (substance abuse, abuse or neglect and, as to A.M., six months' time-in-care) by clear and convincing evidence and that, by a preponderance of the evidence, severance was in the best interests of the children.⁴ Father timely appealed.

DISCUSSION

¶10 To justify termination of Father's parental rights, the juvenile court must find, by clear and convincing evidence, the existence of at least one statutory ground set forth 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). Additionally, the court is obligated to find by a preponderance of the evidence that termination is in the best interests of the child.⁵

⁴ The juvenile court also purported to terminate Father's parental rights on the prior-removal ground specified in A.R.S. § 8-533(B)(11). Although ADES properly concedes this was error, it does not affect our analysis here.

⁵ Father does not challenge the juvenile court's finding that termination of his parental rights was in the best interest of the children. Nor has Father raised any issue regarding the court's decision to allow ADES to amend the petition for termination by adding additional grounds after the close of evidence in a multi-day hearing. We note, however, that there appears to be no reason why ADES could not have made its request much earlier in the proceedings, and at the very latest, when it became aware of Father's drug relapse on the first day of the hearing. Parents are entitled to reasonable notice and an opportunity to be heard in a dependency or termination proceeding. *Matter of Appeal in Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994) ("Due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

Id. 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 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, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶11 Father argues the juvenile court erred in terminating his parental rights because there was insufficient evidence to support any of the alleged grounds for termination. Although the juvenile court terminated Father's parental rights on more than one statutory ground, we only consider whether severance was justified based on Father's chronic drug abuse. See *id.* at 280, ¶ 3, 53 P.3d at 205 (recognizing that an appellate court may affirm if clear and convincing evidence supports any one of the statutory grounds for severance found in § 8-533(B)).

¶12 Pursuant to A.R.S. § 8-533(B)(3), the juvenile court could properly sever Father's rights if (1) he is unable to

of the action and to afford them an opportunity to present their objections.'" (quoting *Maricopa County Juvenile Action No. JS-734*, 25 Ariz. App. 333, 339, 543 P.2d 454, 460 (1975)). Nonetheless, we cannot conclude that the juvenile court's decision to permit the amendment at the close of the hearing rises to the level of fundamental prejudicial error because Father did not request a continuance of the hearing or argue he needed a chance to present any additional evidence in light of ADES' request to amend.

discharge parental responsibilities because he has a history of chronic substance abuse; and (2) reasonable grounds exist "to believe that the condition will continue for a prolonged indeterminate period."⁶

¶13 Father challenges only the first element of § 8-533(B)(3), arguing "[t]here is no evidence in the record that [his] past drug abuse prevents him from discharging [his] parental responsibilities at the present time." Father acknowledges his addiction, but emphasizes he is now getting treatment and has been sober since entering the treatment facility in March 2012.

¶14 Termination under § 8-533(B)(3) "does not require that the parent be found unable to discharge any parental responsibilities," but rather "establish[es] a standard which permits a trial judge flexibility in considering the unique circumstances of each termination case before determining the parent's ability to discharge his or her parental responsibilities." *Matter of Appeal in Maricopa County, Juvenile Action No. JS-5894*, 145 Ariz. 405, 408, 409, 701 P.2d 1213, 1216, 1217 (App. 1985). The impact of drug addiction, including treatment history, is an important factor in gauging

⁶ ADES must also establish that it undertook "reasonable efforts to reunify the family or that such efforts would be futile." *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 453, ¶ 12, 123 P.3d 186, 189 (App. 2005). Father does not challenge ADES' efforts in this regard.

the likelihood a parent will be in a position to carry out necessary parental responsibilities in the future. See *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 378, ¶ 25, 231 P.3d 377, 382 (App. 2010) (citation omitted).

¶15 The juvenile court found that Father's current substance abuse addiction, particularly in light of his failed treatment history, prevents him from carrying out his parental responsibilities. Specifically, it noted that

[d]espite his protestations that he is 'sober,' the Court finds that Father's frequent relapses, his continued use of bath salts and other substances . . . demonstrates his inability to safely parent [his] children[.] This continuing cycle of mental and physical abuse, domestic violence and substance use exposes the children to dangers which cannot be sustained for the safety of the children.

(Emphasis added.) The court further found that Father is "openly defiant of CPS oversight and control," "has an immature and completely false understanding about the extent of the dangers to the minor children," "failed to accurately state to CPS the extent of [his] substance abuse history," and his "dysfunction at child rearing . . . would be placing the children in grave danger." The court also explained it had "no reason to believe that Father will change his behaviors in the future, to the continuing detriment of the minor children. Father has regularly relapsed on illegal and other substances

despite knowing that CPS was requiring his sobriety." The record supports these findings.

¶16 Dorothy McGaw, a residential treatment center therapist, testified that she was concerned about substance abuse "leading to neglect in [] parenting." Larsa Margous, a CPS case manager, testified that Mother and Father are unable to parent and that they pose a "substantial risk of harm to their children" due, in part, to their continued drug use. She also testified that Father has been unable to offer the children safety, consistency, or permanency in their lives and that Father has substantially neglected and willfully refused to remedy his substance abuse. Father's treatment psychiatrist testified that Father would require "a substantial amount of treatment before he is no longer at risk for relapse." Yet Father refused to follow his psychiatrist's recommended treatment plan, indicating his preference to participate in TERROS instead, which was not successful.

¶17 The children were removed from Father and Mother's care because of the sexual abuse allegations; however, Father was aware he needed to remain sober during the second dependency. Knowing that he was facing the prospect of losing his children, he was unable to abstain from substance abuse. Thus, his addiction cannot reasonably be described as being in the "past." He abstained for a short period of time as a result

of intense treatment, but that was too late in the process. Additionally, Father's lack of disclosure to the juvenile court and CPS case workers regarding his substance abuse undercuts his credibility in claiming he can effectively manage his addiction. Father's inability to consistently remain drug free throughout the entirety of his case, despite it being a specific requirement of family reunification, supports the conclusion that Father was unable to discharge his parental responsibilities as a result of his substance abuse.

CONCLUSION

¶18 We affirm the juvenile court's order severing Father's parental rights.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

SAMUEL A. THUMMA, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge