DIVISION ONE
FILED: 2/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCOTT M.,	)	1 CA-JV 12-0218
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
KELLEY H., HAILEY M.,	)	103(G) Ariz.R.P. Juv.
	)	Ct.; Rule 28 ARCAP)
Appellees.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS11982

The Honorable Roland J. Steinle, Judge

AFFIRMED

John L. Popilek, PC — Scottsdale
By John L. Popilek
Attorneys for Appellant

Kelly Hamby, Petitioner/Appellee — Phoenix
In Propria Persona

G O U L D, Judge

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

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Kelley H. ("Mother") were unmarried when their daughter, H.M., was born in 2008 in Phoenix, Arizona. Mother has lived in the Phoenix area with the child since the child was born. Father left Phoenix in June 2011 to visit his parents, who had moved from Phoenix to Montana in late 2010. He decided to stay in Montana to live with his parents, without informing Mother of his intention to do so. Mother only found out Father had moved two months after the fact, when the paternal grandfather called her and said he (the grandfather) was in Phoenix to pack up Father's apartment.

¶3 Before he moved to Montana, Father and Mother had an informal visitation schedule, in which Father would take the child every Thursday to Sunday. However, Father was inconsistent in sticking to the schedule and Mother would have to call the paternal grandparents to remind Father to pick up the child. Sometimes Father would skip his visits entirely. Furthermore, the court found that the exercise of Father's visits was for the benefit of the paternal grandparents.

¶4 Prior to moving to Montana, Father's parents provided some non-monetary support for the child (in the form of diapers, clothes, outings, use of a car, etc.), but after they moved the support ended. Since moving to Montana, Father has not provided financial support for the child, has not regularly contacted her,

and has not sent any cards or gifts on holidays or birthdays. Despite Father's indications that he was unable to contact H.M., Mother's phone number has been the same since Father moved to Montana in June 2011. In fact, prior to this severance action, Father never called his daughter after he moved. Additionally, although Mother and child moved to a new apartment and their address changed, Mother provided their new address after the paternal grandfather requested it. Nothing was ever received at the new address and Father only requested to see his daughter once, on the day of the June 13, 2012 hearing in this matter.

¶5 Father has never been employed on a regular basis. He has been a heroin addict since 2001, which he has attempted to treat through several methadone programs. Despite these treatments, he has never remained employed for long and has relied on his parents for support for the duration of the child's life. As of the date of the trial, the only financial support sent to H.M. since Father moved away was one gift of a money order for $150.00, paid for by the paternal grandfather.

¶6 Mother filed a petition for termination of parent-child relationship on February 27, 2012. A severance hearing was held on May 7, 2012. Father's counsel was ill, so substitute counsel appeared in his place. Due to a misunderstanding with Father's counsel, Father thought he could attend the hearing via a telephonic appearance. Because Father did not appear, the court

entered a default judgment against him. In response to Father's motion to set aside the default judgment, the court held a hearing on June 13, 2012, vacated the default, and scheduled another hearing for July 18, 2012.

¶7 At the hearing, the guardian ad litem for the child testified that it would be in the child's best interests to terminate the rights of Father. The guardian ad litem testified that severance would provide stability for the child, and it would allow Mother's fiancé to adopt the child in the future.

¶8 The superior court severed Father's parental rights based on abandonment, pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-531(1) and -533(B)(1). The court further found severance was in the child's best interests because it would provide her with stability and permanence with Mother and Mother's fiancé and because Father will never be in a position to adequately parent her. Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) and 12-120.21(A)(1).

DISCUSSION

A. Legal Principles

¶9 Before it may terminate a parent's rights, a 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).

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

B. Abandonment

¶11 One of the statutory grounds for severance is that the parent "has abandoned" a child. A.R.S. § 8-533(B)(1). A.R.S. § 8-531(1) defines "abandonment" 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.

¶12 Father asserts the court erred in finding abandonment by clear and convincing evidence, because under the unique "circumstances" of this case Father's conduct did not constitute abandonment. Father cites to *Michael J.* for the proposition that

a father's conduct must be evaluated in light of "the father's ability to perform [his] parental obligations." 196 Ariz. at 250, ¶ 22, 995 P.2d at 686.

¶13 However, Father fails to note that the holding in *Michael J.* stands for the proposition that a parent's incarceration alone cannot justify severance on grounds of abandonment. 196 Ariz. at 250, ¶ 21, 995 P.2d at 686. Unlike the father in *Michael J.*, Father was not incarcerated. The record shows he was voluntarily enrolled in a methadone program in Montana, which allegedly prevented him from traveling.[1] Furthermore, Father previously was enrolled in a methadone program in Phoenix, which allowed him to live near his child. He could have stayed in the program in Phoenix, but he made the decision to leave that program and move to Montana.

¶14 Additionally, notwithstanding the lack of visitation, the evidence was sufficient for the superior court to conclude that Father showed little interest in his child. 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 necessary."

[1] We note that being enrolled in a methadone program in Phoenix did not prevent Father from visiting his parents in Montana.

Pima Cnty. Juv. Severance Action No. S-114487, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994). In the year between Father's move to Montana and the severance hearing, Father only sent one gift of $150.00 to his daughter, which was paid for by the paternal grandfather. *Maricopa Cnty. 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 Father lived in Phoenix, he never provided regular monetary support to the child, although he sometimes brought her diapers, clothing, and other types of supplies.

¶15 In sum, reasonable evidence supported the court's finding that Father abandoned his daughter. *See Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.2d at 205.

C. Best Interests

¶16 Father also argues that the superior court erred in finding that severance would be in H.M.'s best interests pursuant to 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*

Cnty. Juv. Act. No. JS-500274, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-35 (1990).

¶17 Our review of the record reveals that the superior court's determination is supported by a preponderance of the evidence. Father contends H.M. would be left "legally fatherless" if his parental rights were terminated, since Mother is not married and adoption by Mother's fiancé is "pure speculation." However, the court found that severance was in H.M's best interests because Father would never be in a position to provide the "parental presence, love, care, [and] financial support" that H.M. requires. Additionally, severance would place H.M. in a position to be adopted by Mother's fiancé.

¶18 Father has never maintained a normal parental relationship with the child. When the guardian ad litem asked H.M. who her daddy is, she replied that Mother's fiancé is her daddy. When asked about Father, H.M. referred to him as her "old daddy." Father has not been employed on a regular basis and has relied on his parents for support for the duration of the child's life. He has been a heroin addict since 2001, despite participating in several methadone programs. When Father decided to move he did not even inform Mother he was staying in Montana permanently nor did he express concerns about leaving his daughter behind. Since moving to Montana, Father has not sent

any cards or gifts to his daughter, except for one money order which was paid for by the paternal grandfather.

¶19 In short, the evidence before the court supports its finding that Father will never be able to parent H.M. and that terminating his relationship will provide her with stability and permanence in being adopted by Mother's fiancé.

D. Substitution of Counsel

¶20 Father argues the court abused its discretion in denying the substitution of counsel filed by Father's proposed counsel for noncompliance with the Rules of Civil Procedure.[2] The notice of appearance was filed less than two weeks before trial without certification, along with a motion for continuance, and the notice failed to comply with Ariz. R. Civ. P. 5.1(a)(2)(C).[3] The notice of substitution of counsel did not contain either a statement from the proposed counsel that she was

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[2] We apply the rules of civil procedure "[i]n some instances . . . where the juvenile rules are silent." *S.S. v. Super. Ct.*, 178 Ariz. 423, 424, 874 P.2d 980, 981 (App. 1994).

[3] Arizona Rule of Civil Procedure 5.1(a)(2)(C) prohibits an attorney to withdraw as attorney of record after an action has been set for trial, "(i) unless the application for withdrawal contains the signature of the substituting attorney stating that such attorney is advised of the trial date and will be prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, (ii) or unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw." *See also* Ariz. R. P. Juv. Ct. 39(B)(3)(requiring counsel to represent a party until the court orders the termination of representation).

advised of the trial date and would be prepared for trial or a statement from Father that he was advised of the trial date and had made suitable arrangements to be prepared for trial. Accordingly, the court denied the substitution of counsel filed by Father's proposed counsel pursuant to Ariz. Rule of Civ. P. 7.1(C)(2).[4]

¶21 In addition, after the court denied Father's substitution of counsel for noncompliance on July 11, Father had several days in which he could have filed a subsequent motion to comply with Rule 5.1(a)(2)(C). Father chose not to do so. We find no abuse of discretion in the court's denial of Father's last-minute request for substitution of counsel, accompanied by a motion for continuance. *See generally State v. Dixon*, 126 Ariz. 613, 616, 617 P.2d 779, 782 (App. 1980) ("The right to assistance of counsel, while fundamental, may not be employed as a means of delaying or trifling with the court.")

E. Admission of Exhibits

¶22 Father contends the court abused its discretion in refusing to permit the use of previously disclosed exhibits at

[4] Arizona Rule of Civil Procedure 7.1(C)(2) provides that, "[t]o expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

the hearing.[5] Father provided the exhibits to Mother and the guardian ad litem, but as of the date of the hearing, the court had not received a request to incorporate any exhibits. Father's counsel filed a disclosure statement at the end of June that did not include any exhibits.

¶23 At the severance hearing, Father's counsel asked to incorporate the exhibits that had been filed by proposed counsel. Since Father's counsel did not ask leave of the court to incorporate the exhibits before the hearing began, the court informed Father's counsel he would have to submit a written request to extend the deadline for disclosure with an affidavit indicating good cause pursuant to Rule of Civil Procedure 37.[6]

¶24 "'The trial court has broad discretion in ruling on discovery and disclosure matters,' and we will not disturb its ruling absent an abuse of discretion." *Link v. Pima Cnty.*, 193

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[5] The evidence prohibited by the court was of little, if any, probative value on the issue of abandonment. The proffered exhibits consisted of photographs of Father and H.M. when H.M was an infant (*e.g.*, prior to Father's move to Montana), and records concerning telephone and text messages between Mother and paternal grandfather. The exhibits also showed that Father called Mother three times in the two weeks prior to the July 2012 severance hearing and sent her one text message in April 2012.

[6] Arizona Rule of Civil Procedure 37(c)(2) requires a party seeking to use information which that party first disclosed later than sixty (60) days before trial to obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. *See also* Ariz. R. P. Juv. Ct. 44(D)(2) (referencing subsection B(2)(e), which prohibits the use of undisclosed exhibits, except for good cause shown).

Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998). The exhibits were disclosed only seven days before trial, which meant Father had to obtain leave of the court by motion, supported by affidavit, to extend the time for disclosure in order to use the information. Father did not do so. We find no abuse of discretion here.

F. Waiver of Social Study

¶25 Father asserts the court erred in waiving the family social study requirement of A.R.S. § 8-536. However, § 8-536(C) permits the court to waive the social study requirement if it finds "that to do so is in the best interest of the child." At the hearing on May 7, 2012, the court found good cause to waive the social study in light of the fact Mother was receiving food stamps and other government assistance. The guardian ad litem for the child agreed that a social study was not necessary. The court then entered a default judgment against father, which it later vacated, allowing the action to proceed on the merits. However, at no time between May and July did Father's counsel request a social study or ask the court to reconsider the prior waiver of the social study under A.R.S. § 8-536. The court found that Father waived any objection to proceeding without a social study. On July 5, 2012 Father's proposed counsel made the request for a social study, but the court found that it was only

being used as a delay tactic and found that a social study would be of no additional benefit in this case.

¶26 Even though the court did not expressly find that waiving the social study was in the child's best interest, we can infer it did so in compliance with the statute. The court appointed a guardian ad litem to evaluate and protect H.M.'s interests and the guardian ad litem agreed a social study was not necessary.

CONCLUSION

¶27 For the foregoing reasons, we affirm the severance of Father's parental rights to H.M.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge