IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DANA I., BRANDON I., *Appellants*,

v.

DEPARTMENT OF CHILD SAFETY,[1] K.I., L.I., L.I., D.I., *Appellee*.

No. 1 CA-JV 15-0087
FILED 9-10-2015

Appeal from the Superior Court in Maricopa County
No. JS17565
The Honorable Joan M. Sinclair, Judge

AFFIRMED

COUNSEL

John L. Popilek, Scottsdale
Counsel for Appellant Dana I.

Denise Lynn Carroll, Scottsdale
Counsel for Appellant Brandon I.

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[1] Pursuant to S.B. 1001, Section 157, 51st Leg., 2nd Spec. Sess. (Ariz. 2014) (enacted), the Arizona Department of Child Safety ("DCS") is substituted for the Arizona Department of Economic Security in this matter. *See* ARCAP 27. For purposes of consistency, we will refer to DCS throughout this decision.

Arizona Attorney General's Office, Mesa
By Nicholas Chapman-Hushek
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Samuel A. Thumma joined.

KESSLER, Judge:

¶1 Dana I. ("Mother") and Brandon I. ("Father") appeal from the juvenile court's order terminating their parental rights to K.I., L.I., L.I., and D.I. (collectively "the children"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 Mother and Father are the parents of the children.[3] Mother and Father have been living separately since 2011. The Department of Child Safety ("DCS") received a report that Mother was leaving the children alone for prolonged periods and using methamphetamine in the presence of the children. Upon investigation DCS discovered that Mother maintained a "filthy" home that lacked water, electricity, and food. The children were removed from Mother's care in July 2013. The juvenile court adjudicated the children dependent as to Father and Mother late in 2013 and adopted a family reunification case plan.

¶3 In June 2014, DCS filed a petition to terminate the parental relationship as to both Mother and Father for L.I., L.I., and D.I. In October 2014, DCS filed an amended petition for termination adding K.I., with the grounds for severance remaining the same. DCS alleged that the

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[2] We view the evidence in the light most favorable to affirming the juvenile court. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7, 225 P.3d 604, 606 (App. 2010).

[3] Although there is a question as to whether Father is the biological parent of K.I. and another one of the children, no other man stepped forward as the biological father of the two children after DCS published a notice of hearing. Father appeals the severance as to all four children and thus we assume, solely for purposes of resolving Father's appeal, that Father is the father of all four children.

relationship should be terminated as to Mother because Mother was unable to discharge parental responsibilities because of a history of chronic abuse of dangerous drugs, controlled substances, and/or alcohol, and there was reason to believe that the condition would continue for a prolonged indeterminate period. Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(3) (Supp. 2014). DCS also alleged that the three older children had been in an out-of-home placement for a period of nine months or longer, *see* A.R.S. § 8-533(B)(8)(a), and six months or longer for the youngest child who was under the age of three and Mother had substantially neglected or willfully refused to remedy the circumstances that caused the children to be in an out-of-home placement, including refusing to participate in reunification services offered by DCS, *see* A.R.S. § 8-533(B)(8)(b).

¶4 DCS alleged that the parental relationship should be terminated as to Father because of abandonment. *See* A.R.S. § 8-533(B)(1). DCS alleged that Father failed to maintain a normal parental relationship with the children without just cause by failing to provide reasonable support, maintain regular contact, and/or failing to provide normal supervision. *See* A.R.S. § 8-531(1) (Supp. 2014).

¶5 The severance adjudication occurred on three days in February and March 2015. The DCS case manager testified that after the children were removed from the home in 2013, DCS offered Mother substance abuse treatment through TERROS, drug testing through TASC, a parent aid, domestic violence counseling, and a psychological evaluation in order to help reunite her with the children. The case manager testified that Mother failed to fully participate in the programs, and substance abuse treatment and parent aid services were closed due to lack of contact.

¶6 The evidence showed that Mother consistently abused drugs and/or alcohol over the approximately 18 months between the July 2013 removal of the children and the 2015 severance trial. The case manager and Mother testified that from August 2013 to May 2014 Mother completely failed to comply with drug testing. Between May 2014 and February 2015, Mother drug tested sporadically with a period between September and December when she did not test at all. When Mother did submit to testing, she tested positive for prohibited substances several times. In July 2014, Mother tested positive for cocaine. She also tested positive for alcohol in July and August 2014. Mother further testified to using cocaine regularly between July and October 2014, and using methamphetamine and marijuana as recently as November 22, 2014, just months before the severance trial. In addition, Mother admitted to using alcohol just one month before the severance trial began.

¶7 DCS presented evidence that Mother also was not able to properly care for the children during supervised visits. The goal of the parent aid service/supervised visits was for Mother to demonstrate that she could provide proper supervision for the children, and provide necessary materials during the visits such as food, water, and diapers. The case manager reported that Mother was not able to properly supervise the children during visits and that she would lose track of the youngest child. She also failed to bring proper meals, snacks, and water for the children or diapers and wipes for the youngest child.

¶8 The juvenile court severed Mother's parental rights to the children on all the alleged grounds. The court found DCS met its burden of proof on the substance abuse ground and that while DCS provided appropriate reunification services to Mother, she had not taken advantage of them. The court noted that Mother was making some progress but that it had not begun until severance was imminent. The court also found that DCS met its burden of proof as to the time in care. The court held that the children had been in care for "well over" six months for D.I. and nine months for the older children. The court found that "Mother was not able to demonstrate appropriate supervision of the children" and that Mother's participation in reunification services was "minimal until after the severance motion was filed."

¶9 Father testified that he left the home while Mother was pregnant with D.I. in 2011 and had only attempted to contact the children three times since then. Father further testified that he was unaware that the children were in custody until after he was imprisoned in April 2014. However, DCS reported that it was able to locate Father shortly after the children were taken into custody and spoke with him on August 6, 2013. At that time, Father admitted that he had not seen or spoken to the children in "quite some time" and that he did have one of his daughter's phone numbers but had failed to keep in contact with her. Additionally, K.I. reported that she had not seen Father in four years.

¶10 After DCS filed the severance petition, Father began sending the children letters once every six weeks starting in August 2014. He also sent them homemade birthday cards, and registered the children to receive Christmas gifts through the Angel Tree program. The case manager testified that she stopped receiving letters for the children in December 2014.

¶11 The juvenile court severed Father's parental rights to the children based on abandonment. The court found that Father did not "take

every opportunity to maintain" a normal relationship with the children. The court noted that although Father had written to them during the four months prior to the hearing, he did not have any meaningful contact with them for years beforehand. The court believed Father's "efforts were minimal."

¶12 The court also determined by a preponderance of the evidence that termination of Mother's and Father's parental rights was in the best interests of the children who were adoptable and in an adoptable placement because the children "deserve stability and permanency."

¶13 Mother and Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2014), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2014).

DISCUSSION

¶14 A parent's right to custody and control of his or her own child is fundamental, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), but not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). To justify severance of a parental relationship, the State must prove by clear and convincing evidence one of the statutory grounds in A.R.S. § 8-533(B). *See id.* The State must also prove by preponderance of the evidence that severance of the parent-child relationship is in the best interest of the child. *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005).

¶15 Because the juvenile court is in the best position to weigh the evidence and judge credibility, "we 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." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). We do not reweigh the evidence, but "look only to determine if there is evidence to sustain the court's ruling," *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004), and reverse only if no reasonable evidence supports the ruling, *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 376, ¶ 13, 231 P.3d 377, 380 (App. 2010).

I. Sufficient Evidence Supports Termination of Mother's Parental Rights[4]

¶16 Mother argues that she made substantial improvement in dealing with her substance abuse problem so that the court erred by severing her parental relationship with the children under A.R.S. § 8-533(B)(3) because "[t]he 'mental health/substance abuse' factor applies only if the State proves that 'the condition will continue for a prolonged indeterminate period.'" Mother also argues the court erred by finding she substantially neglected or willfully refused to remedy the circumstances that caused the children to be in an out-of-home placement, in violation of A.R.S. § 8-533(B)(8)(a), (b), because she addressed her substance abuse issues, and engaged in domestic violence counseling.[5]

¶17 Pursuant to A.R.S. § 8-533(B)(3) the parent-child relationship may be terminated if "the parent is unable to discharge parental responsibilities because of . . . a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." Essentially, Mother argues that the court erred because by the time of the severance trial, she had sought, and succeeded in dealing with her drug abuse. We disagree.

¶18 Although Mother's attempt to address her substance abuse is commendable, the juvenile court essentially found it is too little too late, a finding supported by the record. Mother did not begin addressing her substance abuse until roughly nine months after the children were removed from the home, and only after DCS informed Mother of their intent to sever

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[4] DCS argues in part that Mother waived or abandoned her arguments regarding sufficiency of evidence because she asks this Court to reweigh the evidence and fails to cite to pertinent portions of the record. We choose to address the merits of Mother's arguments. However, Mother does not argue that the court erred in finding that severance was in the best interests of the children. Accordingly, we will not address that factor as to Mother.

[5] Mother does not contest that she was unable to discharge her parental responsibilities pursuant to A.R.S. § 8-533(B)(3). In any event, there is also evidence that Mother's substance abuse affected her ability to fulfill her parental responsibilities. The case manager testified that Mother was not able to properly supervise the children during visits and that she would lose track of where the youngest child was. She also failed to bring proper meals, snacks, and water for the children, or diapers and wipes for the youngest.

parental rights. In those nine months Mother did not submit to drug testing, and was closed out of TERROS three times for not participating.

¶19 Furthermore, even when Mother began to participate in the drug testing and counseling, she did not do so consistently. She continued to use drugs and tested positive for cocaine once and alcohol twice, and admitted to using methamphetamine and marijuana just three months prior to the severance hearing, and alcohol only one month prior to that hearing.

¶20 Moreover, the record shows Mother has been abusing substances for over 20 years. Given this long-term abuse Mother would need to experience sustained sobriety before she could regain custody of the children. *See Raymond F.,* 224 Ariz. at 378, ¶ 25, 231 P.3d at 382. "[T]emporary abstinence from drugs and alcohol does not outweigh [Mother's] significant history of abuse [and her] consistent inability to abstain [from drugs] during this case. *Id.* at 379, ¶ 29, 231 P.3d at 383. "The interests in permanency for [the children] must prevail over [Mother's] uncertain battle with drugs." *Id.* (first alteration in original) (quoting *Interest of N.F.*, 579 N.W.2d 338, 341 (Iowa Ct. App. 1998)). Making only minimal efforts is impliedly insufficient. *See Margaret H. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 101, 105, ¶ 14, 148 P.3d 1174, 1178 (App. 2006). Accordingly, the juvenile court did not err in terminating Mother's parental rights on this ground.[6]

II. Sufficient Evidence Supports Termination of Father's Parental Rights

¶21 Father argues that the juvenile court erred by finding he abandoned the children. Under A.R.S. § 8-531(1) abandonment is defined as:

> [T]he 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

[6] Although Mother argues that there is not sufficient evidence to show she had negligently failed or willfully refused to remedy the bases for out of home placement, we do not address those arguments because we have affirmed the severance based on substance abuse. *See Jesus M.,* 203 Ariz. at 280 ¶ 3, 53 P.3d at 205 ("if clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.")

> 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.

¶22 "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct." *Michael J.*, 196 Ariz. at 249, ¶ 18, 995 P.2d at 685. "The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity." *Id.* at 251, ¶ 25, 995 P.2d at 687. "[I]n deciding whether a parent has abandoned a child" the court "should consider each of the stated factors—whether a parent has provided 'reasonable support,' 'maintain[ed] regular contact with the child' and provided 'normal supervision.'" *Kenneth B. v. Tina B.*, 226 Ariz. 33, 37, ¶ 18, 243 P.3d 636, 640 (App. 2010) (quoting A.R.S. § 8-531(1)).

¶23 The record supports the juvenile court's conclusion that Father abandoned the children. Father's efforts to communicate with the children were minimal at best. Father admitted that he left the home in 2011 while Mother was pregnant with the youngest, D.I., and that he had only tried to see the children three times since leaving. K.I. reported that she had not seen or spoken with Father in about four years even though Father had the phone number to another daughter living with the children at the time of removal. It was not until Father was imprisoned and severance was imminent that he attempted to develop relationships with the children. Even those attempts were minimal.

¶24 "Imprisonment, per se, neither 'provide[s] a legal defense to a claim of abandonment' nor alone justifies severance on the grounds of abandonment." *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686 (quoting *Pima Cnty. Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (App. 1980)). "[W]hen 'circumstances prevent the . . . father from exercising traditional methods of bonding with his child, he must act persistently to establish the relationship however possible.'" *Id.* (quoting *Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994)). While Father was incarcerated, he made only minimal efforts to bond or establish relationships with the children. Father sent one letter to each child about every six weeks, homemade birthday cards for the children's birthdays, and he registered the children to receive Christmas gifts through the Angel Tree program. However, DCS's case manager testified Father

began sending the children letters starting only in August 2014 and even those letters stopped in December 2014.[7]

¶25 The record also shows Father failed to support the children financially. After leaving the home Father did not financially support the children until he was ordered to do so in a family court proceeding in 2012 and his paychecks were garnished. Even then, Mother testified that she only received one child support payment of $39.

¶26 Father further claims that he maintained contact and interest in the case as soon as he knew the children were in custody, which he testified was after he was imprisoned in April 2014. However, the record shows that Father spoke with a DCS worker in August 2013 and was aware that the children were in custody. DCS did not hear from Father again until after severance proceedings had begun. Thus, the record supports the termination of Father's parental rights due to abandonment.

¶27 Father also argues that severance was not in the best interest of the children. To show that termination is in the best interest of the children DCS needed to prove that the children "would 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) (emphasis added). "The existence of a current adoptive plan is one well-recognized example of such a benefit." *Id.*

¶28 DCS's case manager testified that the children were in an adoptable placement and needed permanency and stability. The juvenile court found severance was in the best interest of the children on that basis. Because an adoptive plan is a recognized benefit of termination, the court did not abuse its discretion in deciding termination was in the best interest of the children. Therefore, the evidence supports the termination of the parent-child relationship as being in the children's best interests.

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[7] Father also argues that he asked to have telephonic and personal visitation with the children while he was incarcerated, but DCS refused that request, thus allegedly thwarting his attempts to develop a relationship with the children. Father, however, did not raise that issue with the juvenile court and never moved to permit such visitation. Having failed to do so with the juvenile court, he cannot now press that argument on appeal. *See Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 179, ¶ 18, 319 P.3d 236, 241 (App. 2014).

CONCLUSION

¶29 For the foregoing reasons we find that there is sufficient evidence to terminate the parent-child relationship as to both Mother and Father, and that severance is in the children's best interests. Therefore we affirm.