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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BRENDEN P., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, G.P., V.P., Z.P., *Appellees*.

No. 1 CA-JV 16-0391
FILED 4-25-2017

Appeal from the Superior Court in Maricopa County
No. JD511243
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

Vierling Law Offices, Phoenix
By Thomas A. Vierling
Counsel for Appellant

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

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Patricia K. Norris joined.

M c M U R D I E, Judge:

¶1 Brenden P. (“Father”) appeals the superior court’s order terminating his parental rights to his three children, G.P., V.P., and Z.P. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Darcella P. (“Mother”) are the biological parents of G.P., V.P., and Z.P. (“the Children”).¹ On August 8, 2013, the Mesa Police Department searched Father’s hotel room and found drugs and drug paraphernalia with G.P. and V.P. present. A neighbor stated he found G.P. wandering the hotel by himself in a diaper at 4:30 a.m., and believed this had occurred on several occasions. Both Father and Mother were arrested for drug possession and probation violations, and taken into custody. G.P. and V.P. were placed in foster care.

¶3 Prior to the Department of Child Services’ (“DCS”) involvement, Father was on probation for another matter.² A petition to revoke Father’s probation was filed in July 2013 for Father’s failure to comply with his terms of probation, including, *inter alia*, (1) failing to register as a sex offender; (2) possessing illegal drugs from October 2012 through December 2012, and March 2013; and (3) missing five drug tests,

¹ Mother’s rights were severed in a separate cause of action and she is not a party to this appeal.

² Father entered a plea agreement in CR2012-103209-001, wherein he pled guilty to possession or use of dangerous drugs (methamphetamine), a class 4 felony. The sentence was suspended and Father was placed on probation to commence on August 27, 2012, for a term of three years.

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and providing eight positive drug tests from May 2013 to June 2013.³ Additionally, in July 2013, Father was indicted with one count of failure to register as a sex offender, a class 4 felony.⁴

¶4 Father was taken into custody on August 8, 2013, and released on August 9, 2013, for possession and use of amphetamines and failure to comply with his probation terms under the 2012 matter. Upon his release, DCS referred Father to TERROS and TASC, and he tested positive for methamphetamine on August 13, 2013. In the 2012 criminal matter, a second petition to revoke probation was filed on August 21, 2013, for possessing or using amphetamines and failing to submit to drug testing. DCS filed a dependency petition on August 14, 2013, as to G.P. and V.P., and the superior court found the Children dependent as to Father. DCS initiated a case plan of family reunification concurrent with severance and adoption.

¶5 While on release from the criminal charge, Father was allowed to visit the Children twice a week. Father indicated to a DCS case worker that it was “easier to spend long amounts of time with his kids when he was high,” and that “two hours is a long time to have a visit.” A DCS case manager stated Father failed to arrive at five scheduled visits, and had only attended two visits as of September 2013.

¶6 Subsequently, Father was arrested on September 27, 2013, for weapons misconduct and driving on a suspended license. Another petition to revoke Father’s probation was filed on October 3, 2013, in the 2012 matter. Father remained incarcerated until November 7, 2013, due to a probation hold in the 2013 charge. Father was later released to pre-trial services, and required to obtain GPS monitoring. Father failed to do so, and a bench warrant issued for his arrest. Father was arrested on November 21, 2013, by the United States Marshal service for leaving the State of Arizona, failing to obtain GPS monitoring, and failing to register as a sex offender within 72 hours of release. Father remained incarcerated until sentencing in

³ Father was convicted of sexual conduct with a minor in the second degree in Beaufort County, South Carolina. Father served 82 days in jail and was required to register as a lifetime sex offender. In 2005, Father failed to register as a sex offender when he moved back to South Carolina, and was arrested. Father was also arrested and charged with possession of crack cocaine in a subsequent incident in South Carolina.

⁴ Maricopa County Superior Court cause number CR2013-430791-001.

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both the 2012 and 2013 matters and during the pendency of the instant DCS matter.

¶7 Father was sentenced in January 2014 for both the 2012 and 2013 matters. Father's sentence was suspended in the 2013 matter, and he was placed on lifetime probation upon serving one year in county jail, consecutive to his sentence of a presumptive term of 2.5 years' incarceration with 116 days of presentence incarceration credit imposed in the 2012 matter. DCS encouraged Father to participate in any services offered to him while incarcerated. Meanwhile, Z.P. was born in May 2014, and was taken into DCS custody with his siblings. DCS filed a petition for dependency in November 2014, and Z.P. was found dependent as to Father in March 2015.

¶8 In March 2015, DCS moved for termination of Father's parent-child relationship with all three children under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8)(c).⁵ Father denied the allegations in the petition, and a two-day contested severance hearing took place in September 2016. A DCS case manager testified regarding the reunification services that were offered to Father while on release, and that visitation was not in the child's best interests while Father was incarcerated.

¶9 Father testified on his own behalf. The superior court granted DCS's motion to sever Father's parental rights as to all three children under A.R.S. § 8-533(B)(8)(c). Father timely appealed and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution; A.R.S. § 8-235(A); and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶10 The right to custody of one's child is fundamental, but not absolute. *Michael J. v. ADES*, 196 Ariz. 246, 248, ¶¶ 11-12 (2000). To support termination of parental rights, one or more of the statutory grounds for termination must be proven by clear and convincing evidence. A.R.S. § 8-537(B); *Shawanee S. v. ADES*, 234 Ariz. 174, 176-77, ¶ 9 (App. 2014). In addition, the court must find by a preponderance of the evidence that termination is in the best interests of the child. A.R.S. § 8-533(B); *Mario G. v. ADES*, 227 Ariz. 282, 285, ¶ 11 (App. 2011).

¶11 As the trier of fact, the superior court is in the best position to weigh the evidence, observe the parties, judge the credibility of the witnesses, and resolve disputed facts. *Jordan C. v. ADES*, 223 Ariz. 86, 93,

⁵ Absent material revision after the relevant date, we cite a statute's or rule's current version.

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¶ 18 (App. 2009). This court does not reweigh the evidence and views the evidence and reasonable inferences in the light most favorable to sustaining the superior court's factual findings. *Jesus M. v. ADES*, 203 Ariz. 278, 282, ¶ 12 (App. 2002); *Jordan C.*, 223 Ariz. at 93, ¶ 18.

¶12 Arizona statutes governing the termination of a parent-child relationship require the superior court to make two findings prior to ordering severance of parental rights. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 280, ¶ 1 (2005). In addition to the grounds established within the immediate case under § 8-533(B)(8)(c), the superior court must determine whether termination of the parent-child relationship is in the best interests of the child. *Id.*

A. Section 8-533(B)(8)(c).

¶13 Section 8-533(B)(8)(c) states that a parent-child relationship may be severed if “the child has been in an out-of-home placement for a cumulative total period of fifteen months or longer . . . 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.” DCS is also required to make a diligent effort toward reunification and to provide appropriate reunification services prior to severance. *Mary Lou C. v. ADES*, 207 Ariz. 43, 49, ¶ 15 (App. 2004). However, DCS need not provide every conceivable service or undertake rehabilitative measures that are futile; instead, it must only provide those measures that have a reasonable prospect of success. *Mary Ellen C. v. ADES*, 193 Ariz. 185, 192, ¶ 34 (App. 1999).

¶14 Father contends the superior court erred in finding DCS had proven the 15-month time-in-care because it is clearly erroneous, contrary to the substantial evidence in the record, and the termination was not in the children's best interests. Specifically, Father argues (1) he has remedied the circumstances that caused the out-of-home placement, (2) DCS failed to provide reasonable services because they did not set up an appointment with a psychologist until two years into the case, and (3) DCS did not offer services while incarcerated.

¶15 At the severance trial, Father admitted G.P. and V.P. had been in out-of-home care since August 2013, and Z.P. had been in out-of-home care since March 2015. In both instances, the children had been in out-of-home care for over 15 months. *See* A.R.S. § 8-533(B)(8)(c).

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¶16 In this case, Father raised lack of services for the first time at the severance hearing. The record indicates he had the opportunity to object to DCS's efforts in providing reunification services as early as October 2013, and failed to do so throughout the proceedings.⁶ The superior court found DCS made diligent efforts to provide Father with reunification services, and the record supports this finding. Father was offered drug testing services through TASC, drug counseling through TERROS, visitation, and transportation upon request. Father provided one drug test, testing positive for methamphetamine, and testified that while he did participate in TERROS, completing intake, he was unable to continue due to his incarcerations in September and November 2013. Father also failed to visit the Children five different times, and last visited with G.P. and V.P. in September 2013.

¶17 Furthermore, upon learning of Father's incarceration in the Department of Corrections, DCS encouraged Father to participate in all services available to him. In fact, Father testified that he completed anger management, cognitive restructuring, NA, AA, and NOW. While we recognize Father's efforts during his incarceration, Father's lifetime probation terms, stemming from his 2013 conviction for failure to register as a sex offender, prevented him from having contact with any child under the age of 18, including relatives. Therefore, DCS was limited in their ability to provide services while Father was incarcerated because they would have been futile given the terms of his probation. *Mary Ellen C.*, 193 Ariz. at 192, ¶ 34.

¶18 The superior court also found Father was unable to remedy the circumstances that caused the Children to be in out-of-home care. The record likewise supports this finding. Father's incarceration is predicated upon his failure to register as a sex offender and drug related issues, causing him to be incarcerated three times within a matter of months. Father has committed two infractions while incarcerated: (1) promoting prison contraband, and (2) "disrupting/or out of place," in June 2015 and September 2015, respectively. Indeed, his infractions while incarcerated further demonstrate a lack of ability and willingness to remedy the causes of incarceration, i.e., failure to control his behavior. Father has a long history of substance abuse, and though he has been sober for the past three years,

⁶ Father's failure to object throughout the periodic review hearings needlessly injects uncertainty and potential delay into the proceedings when timeliness is critical, and did not afford the juvenile court time to address the adequacy of the services. See A.R.S. § 8-846(A); *Shawanee S. v. ADES*, 234 Ariz. 174, 178, ¶ 13 (App. 2014).

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Father has been in a controlled environment, and would need to successfully demonstrate sobriety for a minimum of one year, outside of those confines, before DCS would consider reunification possible.

¶19 Moreover, the record supports the superior court's finding that Father would not be capable of exercising proper parental care in the near future. In early 2015, Father was recommended to participate in a psychosocial evaluation by a DCS psychologist, prior to his engaging in visits with the Children. Dr. Pondell completed Father's evaluation and diagnosed Father with bipolar II disorder, stimulant use disorder, and antisocial personality disorder. Father was categorized as a "medium risk-level for recidivism." Dr. Pondell also later testified Father would not likely resolve his issues given the restrictive terms of his lifetime probation and his personality disorder, which has caused him to disregard others, including his children. Dr. Pondell further recommended Father show sobriety for one year in a non-controlled environment. Because the record contains substantial evidence to justify termination, the superior court did not err in terminating Father's parental rights under A.R.S. § 8-533(B)(8)(c).

B. Best Interests.

¶20 Under A.R.S. § 8-533(B), the superior court must consider the best interests of the child when making a severance determination. In so doing, the court must consider whether the child will benefit from termination of the relationship, or the child would be harmed by continuation of the relationship. *James S. v. ADES*, 193 Ariz. 351, 356, ¶ 18 (App. 1998). In considering the best interests of the child, the court must balance the diluted parental interest against the independent and often adverse interests of the child in a safe and stable home life. *Kent K.*, 210 Ariz. at 286, ¶ 35. In weighing the best interests of the child, a child's adoptability or potential adoptive placement and whether the current placement is meeting the child's needs are considered. *Audra T. v. ADES*, 194 Ariz. 376, 377, ¶ 5 (App. 1998).

¶21 In this case, the superior court found severance was in the Children's best interests. Father's terms of probation prohibit him from having contact with the Children throughout the remainder of their childhood. Additionally, the DCS case manager testified severance would be in the best interests of the child because it would provide each of the Children a drug-free, stable and permanent home, free from criminal activity.

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¶22 Indeed, Father acknowledged that the time it would take for him to “get right” is “not necessarily best for them.” Though Father argues it is in the best interests of the Children to know their Father and states he has a relationship with his children, as evidenced by the hundreds of postcards he had sent them, Father acknowledges he has failed when he had prior opportunities to care for the Children and has never even met Z.P. Furthermore, the record reflects the children are adoptable and living with foster parents who meet all their needs and are willing to adopt. Therefore, we hold that the superior court did not err by finding severance was in the best interests of the Children.

CONCLUSION

¶23 Accordingly, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA