

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

LUIS R., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, A.D., T.D., *Appellees*.

No. 1 CA-JV 17-0030
FILED 10-3-2017

Appeal from the Superior Court in La Paz County
No. S1500JD201400012
The Honorable Samuel E. Vederman, Judge (Retired)

AFFIRMED

COUNSEL

Jessica L. Quickle Attorney at Law, Parker
By Jessica L. Quickle
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Ashlee N. Hoffman
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Thomas C. Kleinschmidt¹ joined.

M c M U R D I E, Judge:

¶1 Luis R. (“Father”) challenges the superior court’s order terminating his parental rights on the ground of out-of-home placement for a cumulative total period of 15 months or longer, and finding it was in his children’s best interests. Because Father has shown no error, we affirm the order.

FACTS² AND PROCEDURAL BACKGROUND

¶2 Father and Lindsey D. (“Mother”, collectively “Parents”) are the parents of A.D., born in December 2009; T.D., born in November 2011; and N.D. born in December 2014 (the “Children”).³ The Department of Child Safety (“DCS”) initially became involved with the family in 2010 and had at least five subsequent contacts.

¶3 As relevant to this case, after N.D. was born substance exposed in December 2014, DCS took A.D. and T.D. into care and filed a dependency petition against Father alleging neglect based on substance abuse, failure to protect the Children from Mother’s substance abuse, and failure to provide the basic necessities of life and a fit and proper home. The superior court adjudicated the Children dependent as to Father in January 2015.

¹ The Honorable Thomas C. Kleinschmidt, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² This court views the evidence in a light most favorable to sustaining the superior court’s findings. *See Manuel M. v. DCS*, 218 Ariz. 205, 207, ¶ 2 (App. 2008).

³ The superior court’s severance of Father’s parental rights to N.D. in La Paz County case number JD201400012 is not at issue in this appeal.

LUIS R. v. DCS, et al.
Decision of the Court

¶4 DCS did not immediately offer Father services because he was incarcerated in La Paz County jail for a domestic violence incident against his mother-in-law. Upon his release from jail, however, he participated in in-home services twice per week. Nevertheless, he did not demonstrate behavioral changes regarding the scheduling, recording and following through with the health care needs of the Children, cleanliness of the home, and parenting skills.

¶5 Father frequently cancelled appointments, and his failure to follow through hindered his progress with the services DCS provided. For example, DCS provided Father and Mother with housing assistance for four months, but they were evicted and forced to move in with friends. Father also failed to participate in drug testing six times in July, August, and September 2015, and he cancelled or failed to show up for five visits with the Children from September to December 2015. When Father did visit, his behavior was inappropriate and he did not make the necessary behavioral changes to eliminate DCS's safety concerns for the Children.

¶6 In December 2015, DCS petitioned to terminate Father's parental rights alleging substance abuse and out-of-home placement for a cumulative total period of nine months or longer, and that termination was in the Children's best interests.⁴ DCS amended the petition to terminate in August 2016 to add the allegation of out-of-home placement for a cumulative total period of 15 months or longer, and at the severance hearing, DCS dismissed the initial two statutory allegations.

¶7 In a detailed order following the conclusion of a two-day hearing ending in October 2016, the superior court found DCS proved the statutory ground by clear and convincing evidence and, by a preponderance of the evidence, that termination was in the Children's best interests.⁵

¶8 This court has jurisdiction over Father's timely appeal pursuant to Article 6, Section 9 of the Arizona Constitution, Arizona Revised Statutes ("A.R.S.") sections 8-235(A), 12-2101(A) and

⁴ Father's parental rights as to N.D. were terminated in February 2016, due in part to his substance abuse.

⁵ Although Father was present for the first day of the hearing, he failed to appear the second day. The court did not continue the hearing or find Father waived any rights by his non-appearance and it proceeded with Father represented by counsel.

12-120.21(A)(1), and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶9 Father argues his due process rights were violated when he was denied a Spanish interpreter throughout the proceedings and the superior court abused its discretion by finding DCS proved by clear and convincing evidence Father had failed to remedy the circumstance that brought the Children into out-of-home placement.

A. Due Process.

¶10 Father argues the superior court violated his right to due process by denying him a Spanish interpreter throughout the severance proceedings. Because he failed to raise this issue or object to the lack of interpretation services in the superior court, our review is solely for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567 (2005). Father bears the burden of demonstrating that error occurred, that it was fundamental, and that it prejudiced him. *See id.* at 567. Father does not argue the alleged error was fundamental and has therefore waived that argument. *See State v. Ramsey*, 211 Ariz. 529, 539, ¶ 30, n. 6, (App. 2005) (defendant failed to argue fundamental error); *State v. Cons*, 208 Ariz. 409, 411, ¶ 3 (App. 2004); *see also State v. Carver*, 160 Ariz. 167, 175 (1989).

¶11 Nevertheless, a review of the record demonstrates that the superior court did not violate Father's right to due process. The Children's guardian ad litem requested an interpreter for Father in October 2015, when the superior court set a severance trial in N.D.'s case. From then on, DCS provided interpretation services to Father at all but two hearings. The DCS case worker testified Father preferred to communicate with her in English and that he did not need an interpreter. Father spoke and understood English and his comfort communicating in English was evident at the severance hearing when Father responded in English on occasion despite the interpreter's presence. Father had notice of all court proceedings, attended hearings, participated in services, and was represented by counsel throughout the dependency.⁶ Therefore, Father was not deprived of his right to due process.

⁶ Father was not represented at one hearing in April 2016, but the hearing was reset, and new counsel was appointed.

B. Severance.

¶12 “Parents possess a fundamental liberty interest in the care, custody, and management of their children.” *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). Even fundamental rights are not absolute, however. *Id.* A court may sever those rights if it finds clear and convincing evidence of one of the statutory grounds for severance, and finds by a preponderance of the evidence that severance is in the children’s best interests. *See* A.R.S. §§ 8-533(B), -537(B); *Kent K.*, 210 Ariz. at 281–82, 288, ¶¶ 7, 41. Because the superior court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts,” this court will affirm an order terminating parental rights if reasonable evidence supports it. *Jordan C. v. DCS*, 223 Ariz. 86, 93, ¶ 18 (App. 2009).

¶13 Severance based on the 15 months’ time-in-care under A.R.S. § 8-533(B)(8)(c) requires proof that:

- (1) “[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer,”
- (2) “the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement,”
- (3) “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,” and
- (4) DCS “has made a diligent effort to provide appropriate reunification services” to the parent.

Father challenges the court’s findings that he was unable to remedy the circumstances that caused the Children to be in an out-of-home placement and that he likely will not be able to parent effectively in the near future.⁷ Reasonable evidence supports the court’s finding.

¶14 T.D. and N.D. were born substance exposed and the superior court found Father knew or should have known of Mother’s use of illegal substances during the pregnancies. Father tested positive for illegal drug use six days after the termination hearing of N.D. At the hearing, Father’s psychologist testified she diagnosed him with several disorders that prevent him from properly parenting his children due to an inability to

⁷ It is undisputed that the Children had been in out-of-home placement for more than 15 months at the time of severance.

LUIS R. v. DCS, et al.
Decision of the Court

manage the stress of his children's needs. Specifically, the psychologist stated that Father's low cognitive functioning, powerful neurotic personality traits, and history of substance abuse, combined with the special needs of his children, would put the Children at risk in Father's care.

¶15 The DCS case manager testified that Father continued to engage in domestic violence despite completing domestic violence classes. Father was arrested twice during the dependency due to domestic violence incidents and argued with Mother in the presence of the Children during visitation. Father's attendance at child and family team meetings was sporadic, and he did not demonstrate an ability to implement his parenting skills during visitations. Further, Father had not contacted any school or doctor to discuss the Children and could not demonstrate a knowledge of their medical conditions.

¶16 Father contends that the record does not support the court's decision because his testimony was contrary to that of the DCS case worker and psychologist. However, the court found that Father was not credible regarding his drug use and did not fully understand the gravity of the Children's special needs. It stated that although Father had performed some services well, it ultimately gave greater weight to the testimony of the psychologist and case manager regarding Father's current ability to parent. [I. 233 p. 7] We defer to the superior court's credibility determinations, and we will not reweigh the evidence on appeal. *See Mary Lou C. v. DCS*, 207 Ariz. 43, 47, ¶ 8 (App. 2004); *Jesus M. v. DCS*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

¶17 In the two years preceding severance, Father did not provide any financial support for his children other than snacks and the occasional meal and toys; he did not proactively demonstrate his desire to care or provide for his children. Reasonable evidence supports the superior court's finding that a substantial likelihood exists that Father will remain unable to exercise proper and effective parental care and control in the near future. Thus, the superior court did not err in finding that clear and convincing evidence supported severance based on 15 months' out-of-home placement.

¶18 Finally, although Father does not challenge the superior court's finding that severance was in the Children's best interests, we note that the record supports the finding. *See generally Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) ("[B]est interests of the child are a necessary, but not exclusively sufficient, condition for an order of termination."). The superior court found and the record supports, that

LUIS R. v. DCS, et al.
Decision of the Court

termination of Father's rights would further the plan to provide the Children with permanency and stability. *See DCS v. Oscar O.*, 209 Ariz. 332, 334, ¶ 6 (App. 2004). The Children are residing in foster placements that are meeting all their needs, where they are doing well, and the Children are adoptable. *See Mary Lou C.*, 207 Ariz. at 50, ¶ 19; *Audra T. v. DCS*, 194 Ariz. 376, 377, ¶ 5 (App. 1998).

CONCLUSION

¶19 For the foregoing reasons, we affirm.



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