

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

GARY R., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.R., *Appellees*.

No. 1 CA-JV 17-0323
FILED 3-13-2018

Appeal from the Superior Court in Maricopa County
No. JD28108
The Honorable Alison Bachus, Judge

AFFIRMED

COUNSEL

The Stavris Law Firm, PLLC, Scottsdale
By Alison Stavris
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Michelle R. Nimmo
Counsel for Appellee

MEMORANDUM DECISION

Judge James P. Beene delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Peter B. Swann joined.

B E E N E, Judge:

¶1 Gary R. (“Father”) appeals the termination of his parental rights to his daughter. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Lacey M. (“Mother”)¹ are the biological parents of S.R. (born in March 2014). Mother tested positive for methamphetamine and amphetamine after giving birth to S.R. Shortly thereafter, the Department of Child Safety (“DCS”) took S.R. into temporary physical custody and filed a dependency petition. DCS alleged that Father was unable to parent S.R. due to methamphetamine abuse, domestic violence, and lack of an appropriate home.

¶3 During the pendency of the case, DCS provided Father with several services, including urinalysis testing, substance-abuse assessment and treatment, domestic violence counseling, transportation, supervised visitation, and an in-home family reunification team. Father tested positive for high levels of marijuana throughout the dependency. Though Father completed substance abuse treatment and recovery maintenance in 2016, his participation throughout treatment was inconsistent and he admitted that he continued smoking marijuana through April 2017. Father closed out of parent-aide unsuccessfully for violating the safety plan by using marijuana in the home.

¶4 In 2016, DCS moved to terminate Father’s parental rights to S.R. based on nine and fifteen months out-of-home placement. Ariz. Rev. Stat. (“A.R.S”) §§ 8-533(B)(8)(a) and -533(B)(8)(c). The hearing on the motion was not held until May 2017, affording Father more time to attempt reunification with S.R. At the termination hearing, Father testified that he used marijuana until very recently. Additionally, he admitted that he failed

¹ The superior court also terminated Mother’s parental rights in 2017; however, she is not a party to this appeal.

GARY R. v. DCS, S.R.
Decision of the Court

to protect the child from Mother's substance abuse and erratic behavior. DCS case manager Cheryl Kelly testified that she had ongoing concerns with Father's domestic violence and substance abuse, but her main concern was failure to protect from Mother.

¶5 In June 2017, the superior court terminated Father's parental rights to S.R. on both grounds alleged in the petition and found that severance would be in S.R.'s best interests. Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) and 12-120.21(A)(1).

DISCUSSION

¶6 The right to parent one's child is fundamental but not absolute. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). The superior court may terminate parental rights if it finds, "by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533," and by a preponderance of the evidence that termination is in the best interests of the child. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12 (2000); *Kent K.*, 210 Ariz. at 284, ¶ 22.

¶7 We review an order terminating parental rights for an abuse of discretion and will not reverse unless "there is no reasonable evidence to support" the order. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). Because the superior court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings," we will accept its findings of fact unless no reasonable evidence supports them. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

I. Sufficient Evidence Supports Severance

¶8 Father argues insufficient evidence supports the superior court's order severing his parental rights. To meet its burden under A.R.S. § 8-533(B)(8)(c), DCS was required to prove that (1) the child was in an out-of-home placement for at least fifteen months, (2) it "made diligent effort to provide appropriate reunification services," (3) "the parent has been unable to remedy the circumstances" causing the out-of-home placement, and (4) "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.”²

A. Diligent Effort to Provide Appropriate Reunification Services

¶9 Father argues DCS failed to provide court-ordered couples counseling services. DCS makes a diligent effort to provide appropriate reunification services when it gives the parent “the time and opportunity to participate in programs designed to help [him] become an effective parent.” *Christina G. v. Ariz. Dep’t of Econ. Sec.*, 227 Ariz. 231, 235, ¶ 14 (App. 2011) (citation omitted). However, DCS is not required to provide futile services, *Mary Lou C.*, 207 Ariz. at 50, ¶ 18, or services with no “reasonable prospect of success,” *Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 34 (App. 1999).

¶10 At the termination hearing, Kelly testified that DCS did make a referral for couples counseling, but the referrals were declined until the couple could demonstrate sobriety. Father never demonstrated sobriety during the three-year dependency. Moreover, Father inconsistently participated in drug rehabilitation services and testified that domestic violence classes were “bogus.” Sufficient evidence supports the superior court’s finding that it was reasonable for DCS to refer but not provide couple’s counseling due to the couple’s lack of sobriety and inconsistent participation in services.

B. Unable to Remedy Circumstances Causing Out-of-Home Placement

¶11 The superior court found that Father was unable to remedy the circumstances causing S.R. to be in an out-of-home placement due to his failure to provide S.R. a drug-free home or protect her from Mother’s substance abuse. Based on this record, we agree.

¶12 Though Father testified he must use highly concentrated marijuana because it is the only thing that controls his back pain, he provided no evidence to support that claim. Father was closed out of parent-aid unsuccessfully after he used marijuana in his house in violation of the safety plan. While Father completed standard outpatient treatment and recovery management, he also testified he would continue to use

² Father does not challenge the superior court’s findings that S.R. had been in an out-of-home placement for at least fifteen months. Thus, we do not address it.

marijuana if he could afford a medical marijuana card. Further, his levels of THC as recently as April 2017 were strikingly high.

¶13 The dependency was initiated after Mother tested positive for methamphetamine and amphetamine after giving birth to S.R. Father admitted that at the time, he knew Mother was using drugs, but he failed to stop her. Though he testified he is aware Mother's continued substance abuse poses a risk to S.R., he has taken no steps to remove himself or Mother from the home. He testified that despite three years of counseling at Terros, he is still unable to tell when Mother is under the influence of substances. Moreover, he testified he does not ask Mother if she is using substances because she is an adult. Despite knowing for over a year that removing Mother from the home may be required to ensure a safe environment, he testified that he has not done so because Mother was on the apartment lease.

¶14 Relying on *Maricopa Cty. Juvenile Action JS-501568*, Father argues that because he completed all services required by DCS, the superior court lacked the evidence to demonstrate he substantially neglected or willfully refused to remedy the circumstances which caused the removal of his child. *Id.*, 177 Ariz. 571, 576 (App. 1994) (parents who make good faith efforts to comply with DCS remedial programs will not be found to have substantially neglected to remedy removal circumstances). However, this argument is without merit as the fifteen months' out-of-home placement ground does not require substantial neglect or willful refusal to remedy circumstances. We conclude that the superior court did not abuse its discretion in finding Father had not remedied the circumstances that caused S.R. to be in out-of-home placement.

C. Substantial Likelihood Father Will Not be Capable of Exercising Proper and Effective Parental Care and Control in the Near Future

¶15 Father argues that the superior court did not assign proper weight to his testimony regarding his willingness to protect his child from Mother in the future. Because we do not reweigh the evidence on appeal, Father's claim fails. *Jesus M.*, 203 Ariz. at 282, ¶ 12. Accordingly, we find that reasonable evidence supports the court's decision to terminate Father's parental rights to S.R. under A.R.S. § 8-533(B)(8)(c).³

³ Because we find that the evidence supports termination of Father's parental rights on the grounds of fifteen months out-of-home placement,

II. Best Interests

¶16 Father argues the superior court lacked sufficient evidence to find by a preponderance of the evidence that severance was in S.R.'s best interests.

¶17 To prove that severance is in the child's best interests, DCS must show that the child would either benefit from the severance or be harmed by a continuation of the parental relationship. *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, 288, ¶ 26 (App. 2011). We will uphold the superior court's best interests determination if a preponderance of the evidence supports it. *Kent K.*, 210 Ariz. at 284, ¶ 22. It is sufficient that DCS show severance would free a child for adoption, and that the child would benefit from finding an adoptive placement. See *Maricopa Cty. Juvenile Action No. JS-501904*, 180 Ariz. 348, 352 (App. 1994).

¶18 The superior court's finding that severance was in S.R.'s best interests is supported by a preponderance of the evidence. Kelly testified that S.R. is currently placed in a licensed foster home that is meeting all of her needs. Kelly said the foster placement is willing to adopt S.R., and adoption would benefit S.R. by providing her a "forever family who will love and care for her." Further, Kelly testified that maintaining the relationship with Father would be harmful to S.R., because the impermanence of visiting multiple homes may become confusing. Finally, Kelly said the potential kinship placement Father referenced is out-of-state, and keeping her with an in-state placement will allow her the possibility of maintaining a relationship with her sister. We agree with the superior court: S.R. "needs and deserves parents she can count on," and although Father is bonded with S.R., "[l]eaving the window of opportunity open for remediation indefinitely is not necessary, nor do we think that it is in the child's or the parent's best interests." *JS-501568*, 177 Ariz. at, 577.

we need not address the superior court's termination on the grounds of nine months out-of-home placement. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3 (App. 2002) ("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.").

GARY R. v. DCS, S.R.
Decision of the Court

CONCLUSION

¶19 Based on the foregoing, we affirm the superior court's order terminating Father's parental rights to his child.



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