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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JOHN W., *Appellant,*

v.

ELIZABETH S., S.S., *Appellees.*

No. 1 CA-JV 17-0337
FILED 2-27-2018

Appeal from the Superior Court in Mohave County
No. L8015SV201607004
The Honorable Douglas Camacho, Judge *Pro Tempore*

AFFIRMED

APPEARANCES

Garnice Law, PLLC, Scottsdale
By Victor A. Garnice
Counsel for Appellant

Elizabeth S., Lake Havasu City
Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

M O R S E, Judge:

¶1 John W. ("Father") appeals the juvenile court's order terminating his parental rights to S.S. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Elizabeth S. ("Mother") began an "on again, off again" relationship in 2005, moved in together after Mother became pregnant with S.S. in 2006, but never married. S.S. was born in May 2007, and Father and Mother are his biological parents.

¶3 A few months after S.S. was born, Father, Mother, and S.S. moved from Arizona to North Carolina. The three lived together until Mother and S.S. returned to Arizona in August 2008. In October 2008, Father moved from North Carolina to Colorado. Over the next 18 months, Father traveled to Arizona to see S.S. several times a year, spending at least a week each time, and regularly called S.S. Then, in early 2010, Father moved back to Arizona to be closer to S.S. After returning to Arizona, Father regularly spent time with S.S.

¶4 In March 2011, Mother petitioned to establish legal decision making, parenting time, and child support. In 2012, Mother moved for court-ordered parenting time for Father. In August 2013, while Mother's 2011 action was pending, Mother stopped allowing Father to spend time with S.S. because Father's living arrangements were uncertain, Father had included a baggy full of multivitamins in S.S.'s lunch, and Mother felt that a relationship with Father was not in S.S.'s best interests. Eventually, Mother moved to dismiss her case because Father did not comply with multiple court orders to provide a notice of paternity testing. The court granted the motion and dismissed the case in March 2014. Father did not object to the dismissal.

¶5 Over a two-and-a-half-year period, Father attempted to communicate with S.S. only through three text messages to Mother: on Christmas Day 2013, around S.S.'s 2014 birthday, and around S.S.'s 2015

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birthday. Father made no other effort to contact or support S.S. between August 2013 and February 2016.

¶6 Father's first meaningful effort to reestablish a relationship with S.S. was when he petitioned to establish paternity, legal decision making, parenting time, and child support in February 2016. Mother responded by petitioning to sever Father's parental rights in March 2016. She alleged as grounds for severance Father's (1) abandonment pursuant to Arizona Revised Statutes ("A.R.S.") § 8-533(B)(1); and (2) inability to discharge his parental responsibilities due to mental illness or a chronic history of substance abuse pursuant to A.R.S. § 8-533(B)(3).

¶7 After a five-day hearing that devoted substantial time to actions occurring before August 2013, the juvenile court found by clear and convincing evidence that Father had abandoned S.S. The juvenile court based its decision upon Father's failure to "vigorously and consistently assert his right" to have a parental relationship with S.S.; his minimal effort to overcome the obstacles Mother created; and his failure to provide reasonable support for S.S. The juvenile court found by a preponderance of the evidence that severance was in S.S.'s best interests because Mother's new husband was willing to adopt S.S. and adoption would bring stability to S.S.'s life.

¶8 Father timely appealed the juvenile court's order and we have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), and 12-2101(A)(1).

DISCUSSION

¶9 Father argues that the juvenile court erred in severing his parental rights because he had not abandoned S.S. and severance was not in S.S.'s best interests. We will affirm a juvenile court's termination of parental rights absent an abuse of discretion and accept its findings of fact unless they are clearly erroneous. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). A juvenile 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 child's best interest." *Jennifer S. v. Dep't of Child Safety*, 240 Ariz. 282, 286, ¶ 15 (App. 2016).

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I. Abandonment

¶10 Father argues that Mother may not prove severance with evidence of his lack of parental involvement because she stopped him from seeing S.S. We disagree.

¶11 Under A.R.S. § 8-533(B)(1), parental rights may be severed when a parent abandons a child. Abandonment is defined in A.R.S. § 8-531(1):

"Abandonment" means 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.

"Under the revised statute, abandonment is measured not by a parent's subjective intent, but by the parent's conduct." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 18 (2000). Whether a parent has exercised the requisite effort to maintain a parent-child relationship must be determined on a case-by-case basis. *Id.* at 250, ¶ 20.

¶12 There is no dispute that Father regularly spent time with S.S. before August 2013. Even when father lived out of state, he talked to S.S. over the phone and regularly traveled to Arizona to visit. However, after 2013, Father no longer had parenting time with, and did not provide support for, S.S. Father also failed to actively pursue the original pending parenting time case or make any additional court filings until February 2016.

¶13 The crux of Father's argument is that his lack of outward effort should be excused because Mother prevented him from seeing S.S. Father attempts to find support for this argument in *Calvin B. v. Brittany B.*, 232 Ariz. 292 (App. 2013), and *Jose M. v. Eleanor J.*, 234 Ariz. 13 (App. 2014). A "parent who has persistently and substantially restricted the other parent's interaction with their child may not prove abandonment based on evidence that the other has had only limited involvement with the child." *Calvin B.*, 232 Ariz. at 293-94, ¶ 1.

¶14 In *Calvin B.*, the mother limited the father to short visits, filed for and received two orders of protection against the father, violated a

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parenting-time order, and cancelled scheduled visits within the six-month abandonment period. *Id.* at 297, ¶¶ 22-24. In *Jose M.*, the mother filed a restraining order, prevented the father from visiting with the child, changed her phone number, blocked father on social media, and filed for severance in response to the father's petition for parenting time. 234 Ariz. at 15-17, ¶¶ 6, 7, 9, 19.

¶15 Unlike in *Calvin B.* and *Jose M.*, the evidence within this record establishes that Mother did not "persistently and substantially" interfere with Father's interaction with S.S. Over two and a half years, Mother never changed her number, moved, or prevented Father from contacting her through an order of protection. While Mother's actions created an obstacle for Father to overcome, her actions were not persistent or substantial.

¶16 Mother's obstacles do not absolve Father from his absolute lack of effort because Father demonstrated only minimal effort to communicate with S.S., made no attempt to support S.S., and failed to pursue any legal remedies. *See* A.R.S. § 8-531(1) (including "minimal efforts to support and communicate with the child" in the definition of "abandonment"); *see also* *Michael J.*, 196 Ariz. at 251, ¶ 25 ("The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity."). "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.'" *Jose M.*, 234 Ariz. at 16, ¶ 14 (emphasis added) (quoting *Michael J.*, 196 Ariz. at 250, ¶ 22).

¶17 Father was neither persistent nor vigorous and his efforts fall far short of the father in *Calvin B.*, who "actively sought more involvement with their son than [the mother] would allow" and pursued multiple court orders granting him parenting time. 232 Ariz. at 297-98, ¶¶ 22, 26, 29. In contrast, Father never persistently pursued involvement with S.S., and did not assert his legal rights, either through Mother's 2011 petition to establish parenting time for Father or any additional filings. Father's lack of vigor was demonstrated by his two-and-a-half-year delay before he filed his first petition to regain parenting time. Father also exerted only minimal effort to maintain communication with S.S. and sent only three text messages (but never birthday cards or Christmas gifts) in two and a half years. Nor did Father call Mother to ask to speak to S.S., or stop by Mother's house. Father's negligible efforts to maintain the parent-child relationship or establish his parental rights for more than two years supports the juvenile court's finding that Father abandoned S.S.

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¶18 Father's reliance on *Jose M.* is also misplaced. There, the court simply remanded the case because the juvenile court had a mistaken understanding of the evidence and failed to consider mother's interference with the father's attempts to spend time with the child. *Jose M.*, 234 Ariz. at 17, ¶ 19. Here, the juvenile court considered those facts, and Father has not argued that it did not understand them. "[W]e will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002). Because clear and convincing evidence within the record supports the juvenile court's findings, we affirm its finding that Father abandoned S.S.

II. Best Interests

¶19 Father also argues that the juvenile court abused its discretion in finding that severance was in the best interests of S.S.

¶20 The best interests inquiry requires a court balance the parent's rights "against the independent and often adverse interests of the child in a safe and stable home life." *Kent K. v. Bobby M.*, 210 Ariz. 279, 286, ¶ 35 (2005). "[T]he best interests inquiry focuses primarily upon the interests of the child, as distinct from those of the parent." *Id.* at 287, ¶ 37. "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *In re Maricopa Cty. Juvenile Action No. JS-500274*, 167 Ariz. 1, 5 (1990).

¶21 "When a current placement meets the child's needs and the child's prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child's best interests." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12 (2016); *Mary Lou C.*, 207 Ariz. at 50, ¶ 19 (finding that the best interests requirement may be satisfied if there is credible evidence of an adoptive plan or the child is adoptable). "Of course, a court need not automatically conclude that severance is in a child's best interests just because the child is adoptable; there may be other circumstances indicating that severance is not the best option." *Demetrius L.*, 239 Ariz. at 4, ¶ 14. The juvenile court must consider the totality of circumstances when making a best interests finding. *Dominique M. v. Dep't of Child Safety*, 240 Ariz. 96, 99, ¶ 12 (App. 2016).

¶22 In a recent decision, this court again reiterated that a best interests determination must consider relevant factors, not just

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adoptability. In *Alma S. v. Dep't of Child Safety*, the juvenile court terminated the mother's parental rights because she had failed to prevent the father from abusing her child. --- Ariz. --- , 2017 WL 5413119, *1, ¶ 7 (Ariz. App. Nov. 14, 2017). This court reversed that decision because adoptability standing alone was not sufficient to support the best interests finding, in light of the other factors that weighed against severance. *Id.* at *8, ¶¶ 33, 37.

¶23 In this case, the juvenile court considered the totality of the circumstances and determined that severance was in the best interests of the child. S.S. lived with Mother and her husband ("Stepfather") for the last four years and bonded with Stepfather, calling him "dad." Stepfather also provided financial support for S.S. The juvenile court found that Father's complete absence from S.S.'s life for multiple years had impacted the bond between Father and S.S., and Father would not be able to "simply 'catch up.'" Further, Stepfather expressed a willingness to adopt S.S., which would stabilize S.S.'s life.

¶24 We accept the juvenile court's findings because they are supported by reasonable evidence within the record. *See Jesus M.*, 203 Ariz. at 280, ¶ 4. Because a preponderance of the evidence within the record supports the juvenile court's findings, we affirm its finding that severance is in S.S.'s best interests.

III. Attorneys' Fees

¶25 Father requests an award of his attorneys' fees and costs on appeal pursuant to Arizona Rule of Civil Appellate Procedure 21. We deny Father's request because he did not prevail on appeal.

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CONCLUSION

¶26 We affirm the juvenile court's order terminating Father's parental rights to S.S. and deny Father's request for attorneys' fees and costs.



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