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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ALAN M., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, B.M., *Appellees*.

No. 1 CA-JV 17-0455
FILED 3-20-2018

Appeal from the Superior Court in Maricopa County
No. JD28690
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Law Office of H. Clark Jones LLC, Mesa
By H. Clark Jones
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Carol A. Salvati
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Alan M. (“Father”) appeals the superior court’s order terminating his parental rights to his child. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Taylor M. (“Mother”) are the parents of B.M., born October 3, 2015.¹ B.M. was born prematurely with resulting physical disabilities, including respiratory issues requiring minimal exposure to allergens. Father was not present immediately following B.M.’s birth. The Department of Child Services (“DCS”) took temporary custody of B.M. on November 13, 2015. As Father’s whereabouts were unknown to DCS at the time DCS took custody of the child, DCS engaged a parent locator to search for Father. DCS eventually filed an out-of-home dependency petition, alleging B.M. was dependent as to Father because Father was unwilling or unable to provide proper and effective parental care and control because Father: (1) failed to provide for B.M.’s basic needs; (2) failed to seek proper treatment for his mental-health issues; and (3) engaged in substance abuse. The superior court made B.M. a temporary ward of the court on November 19, 2015, committing B.M. to DCS’s legal care, custody, and control.

¶3 On November 25, 2015, Father pled guilty to possession of drug paraphernalia, a class six undesignated felony. Father was placed on two years’ probation. As part of Father’s probationary terms, Father was required to complete a 36-hour substance-abuse program.

¶4 On May 4, 2016, the superior court held a combined publication and continued initial dependency hearing regarding Father,

¹ Mother’s parental rights to B.M. have been severed, and she is not a party to this appeal.

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but Father failed to appear. The court proceeded without Father, finding that service was proper, and Father failed to appear without good cause. The court found B.M. dependent as to Father and committed him to DCS's care, custody, and control. The court adopted a case plan of family reunification concurrent with an alternative plan for severance and adoption.

¶5 Father made his first appearance in the dependency proceedings on June 7, 2016. At the time of Father's first appearance, B.M. had been in DCS's custody for 207 days. DCS offered Father reunification services including a substance abuse assessment, urinalysis testing, substance abuse treatment, parent-aide services, a psychological evaluation, and transportation. Additionally, Father was given supervised weekly visits with B.M. at a minimum of two visits per week for two hours.

¶6 Father participated in a substance-abuse assessment in June 2016 with TERROS, but Father did not meet TERROS's treatment criteria because he possessed and used medical marijuana. DCS recommended an additional TERROS assessment after Father tested positive for methamphetamine on July 1, 2016. In addition, TERROS recommended Father participate in standard outpatient treatment, but Father declined. Father opted instead to "self-refer" to another program, Chicanos Por La Causa's substance-abuse program. Father participated in Chicanos Por La Causa's substance-abuse treatment program from January 30, 2017 through April 4, 2017, but failed to attend two consecutive classes on March 21 and 28, requiring Father to restart the program.

¶7 In March 2017, a psychologist who examined Father determined B.M. was at risk of neglect from Father because of Father's: (1) inconsistency in meeting B.M.'s basic needs; (2) cigarette and marijuana smoking, which would exacerbate B.M.'s respiratory issues; and (3) inability to manage his anger and low frustration tolerance, which creates a risk of potentially dangerous or violent situations.

¶8 On May 4, 2017, DCS offered Father individual counseling with an anger-management component through Lifeline, but Father attended fewer sessions than he missed. On May 8, 2017, DCS moved to sever Father's parental rights to B.M. pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8). Furthermore, DCS alleged that severing Father's rights was in B.M.'s best interest.

¶9 After the severance petition was filed, B.M. was brought to DCS's office for a scheduled visit with Father. A case aide searched for

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Father in the primary waiting room while Father waited in the secondary waiting room. The case aide believed Father to be absent for the visit, which aggravated Father when he discovered he had been listed as missing. Father was unable to calm down, so the case aide called security and the visit was cancelled. The next month, shortly before the severance hearing, Father cancelled three visits with B.M.

¶10 The severance hearing was held on August 15, 2017. At that time, Father was working as a cook for a local restaurant, living in his girlfriend's studio apartment, paying 52% of his income in child support (for children other than B.M.), and paying probation expenses. Father had not completed the 36-hour substance-abuse program through Chicanos Por La Causa or any other provider, or the individual anger-management counseling.

¶11 B.M. had been with his foster family for nearly two years at the time of the severance hearing, and B.M.'s foster family was interested in adopting B.M. Regardless of whether his foster family could adopt him or not, B.M. was considered an adoptable child. Meanwhile, Father remained noncommittal to the reunification services or attending B.M.'s medical appointments.

¶12 After the hearing, the superior court found, pursuant to A.R.S. § 8-533(B)(8)(c), DCS had proven by clear and convincing evidence that B.M. had been in an out-of-home placement for a cumulative period of at least 15 months, Father was unable to remedy the circumstances placing B.M. in out-of-home placement, and there was a substantial likelihood that Father could not exercise proper and effective parental care and control in the near future. Additionally, the superior court found severance of Father's parental rights to be in B.M.'s best interest. The superior court then severed Father's parental rights to B.M. under A.R.S. § 8-533(B)(8)(c).

¶13 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

¶14 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

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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).

¶15 “The [superior court], as the trier of fact in a termination proceeding, ‘is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.’” *Jordan C. v. ADES*, 223 Ariz. 86, 93, ¶ 18 (App. 2009) (quoting *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004)). 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. *Jordan C.*, 223 Ariz. at 93, ¶ 18; *Jesus M. v. ADES*, 203 Ariz. 278, 282, ¶ 12 (App. 2002).

A. DCS Presented Sufficient Evidence to Support the Court’s Finding that Father’s Parental Rights Should be Terminated Under Section 8-533(B)(8)(c).

¶16 In its answering brief, the State takes the position that we do not need to determine whether the superior court erred by terminating Father’s parental rights under A.R.S. § 8-533(B)(8)(c) because there were other grounds for termination found by the court that are not challenged on appeal. See *Michael J.*, 196 Ariz. at 251, ¶ 27. We would agree with the State’s legal proposition if the factual assertion were correct. In the final signed order entered by the court on September 21, 2017, the court specifically struck the findings regarding Father for the A.R.S. § 8-533(B)(8)(a) and (b) termination, thereby leaving only the A.R.S. § 8-533(B)(8)(c) finding regarding Father applicable. Inexplicably, the court then ordered Father’s rights severed under all three sections. Given this record, we must assume only the A.R.S. § 8-533(B)(8)(c) finding formed the basis for termination and will proceed addressing the merits of the issue raised by Father.

¶17 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 . . . [and] 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 futile rehabilitative measures; instead, it must only provide those measures

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that have a “reasonable prospect of success.” *Mary Ellen C. v. ADES*, 193 Ariz. 185, 192, ¶ 34 (App. 1999).

¶18 Father contends the superior court erred by finding DCS had proven Father was unable to remedy the circumstances that caused B.M. to be in an out-of-home placement because there is a substantial likelihood that Father can exercise proper and effective parental care and control in the near future. Specifically, Father argues (1) his whereabouts are no longer unknown; (2) he participated in some reunification services; (3) he had become present in B.M.’s life; and (4) he created stability prior to the hearing because he moved into his girlfriend’s studio apartment and found employment.

¶19 As part of Father’s case plan, the superior court ordered DCS to provide Father with a substance abuse assessment, urinalysis testing, substance-abuse treatment, parent-aide services, a psychological evaluation, and transportation. Father’s probationary terms likewise required that he complete a 36-hour substance-abuse program. In addition to Father’s case plan obligations, Father was granted a minimum of two visits per week for two hours with B.M.

¶20 The superior court found that DCS had appropriately provided Father with the required reunification services, but Father failed to complete most of those services. Father contends that he completed his substance abuse assessment, psychological evaluation, and parent-aide services, and completing these services was sufficient evidence that he could provide proper and effective parental care and control. However, Father missed many of the urinalysis tests, failed to complete his substance-abuse program through Los Chicanos Por La Causa or any other provider, and did not complete individualized counseling with an anger-management component. While Father argues that he tested positive for methamphetamine only once over a year before the hearing and provided multiple clean tests during that period, Father missed several urinalysis tests including three consecutively. Accordingly, we agree with the superior court’s finding that Father was appropriately provided services and did not substantially complete those services.

¶21 Furthermore, the record supports the superior court’s finding that Father was not capable of exercising proper and effective parental care. While the superior court’s decision did not specifically mention Father’s whereabouts or efforts to establish a relationship with B.M., the record contains evidence that Father missed visitations with B.M., attended none of B.M.’s medical appointments, and continued to use medical marijuana

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despite B.M.'s respiratory issues. The superior court is in the best position to weigh the evidence and determine its credibility. *See Shawanee S.*, 234 Ariz. at 178, ¶ 15.

¶22 Similarly, the record supports the superior court's finding that there is a substantial likelihood that Father will not be capable of exercising proper and effective parental care and control in the near future. Despite Father's contention that recent employment and moving into his girlfriend's studio apartment created sufficient stability, this is only part of the totality of the circumstances the superior court weighs when deciding if a parent can exercise proper parental care. *See Dominique M. v. DCS*, 240 Ariz. 96, 99, ¶ 12 (App. 2016). The superior court found that Father's lack of compliance with the case plan requirements and services, specifically, failing to complete the Los Chicanos Por La Causa treatment program, declining TERROS services, and failing to complete individual counseling, placed B.M. at a substantial and ongoing risk of harm due to neglect. Because the record contains substantial evidence to justify termination, the superior court did not err by terminating Father's parental rights under A.R.S. § 8-533(B)(8)(c).

B. The Court Did Not Abuse its Discretion by Determining that it was in B.M.'s Best Interests to Terminate Father's Parental Rights.

¶23 Under A.R.S. § 8-533(B), the superior court must also 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 the termination of the relationship, or whether the child would be harmed by the 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 parental interest against the "independent and often adverse interests of the child to have a safe and stable home life." *Kent K. v. Bobby M.*, 210 Ariz. 279, 286, ¶ 35 (2005). 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).

¶24 In this case, the superior court determined that B.M. will benefit from termination of Father's rights because "termination will provide the child with stability, permanency, and a safe, stable, substance-abuse free home." Additionally, the superior court determined B.M. was currently residing in a prospective adoptive placement, and even if that placement was disrupted for any reason, B.M. is adoptable and another placement could be identified.

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¶25 While father contends it is in the best interest of B.M. to have a continuing relationship with his father and states he has a relationship with B.M., Father continues to use marijuana despite B.M.'s respiratory issues; failed to attend B.M.'s medical appointments; and failed to complete all DCS's reunification services. The superior court did not err by finding severance was in the best interest of B.M.

CONCLUSION

¶26 Accordingly, we affirm.



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