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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JASON W., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, A.D., J.W., E.D., *Appellees*.

No. 1 CA-JV 17-0485
FILED 4-24-2018

Appeal from the Superior Court in Maricopa County
No. JD30066
The Honorable Bruce R. Cohen, Judge

AFFIRMED

COUNSEL

Maricopa County Legal Defender's Office, Phoenix
By Kathryn E. Harris
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Amber E. Pershon
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 Jason W. (“Father”) appeals the superior court’s order terminating his parental rights to his son, J.W. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Aftyn D. (“Mother”) are the biological parents of J.W., born in 2010. Mother is also the biological parent of two other children, A.D. and E.D. A.D., E.D., and J.W. (“the Children”) each have different fathers.¹ For most of the first year of J.W.’s life, Mother and Father lived together in Pennsylvania. In 2011, Mother moved with J.W. to Arizona. After moving to Arizona, Mother obtained an order of protection against Father.

¶3 Mother had a history of domestically violent relationships. In February 2015, E.D.’s father beat Mother and held a gun to Mother’s head in front of the Children. He then refused to allow Mother or the Children to leave his home until Mother’s wounds healed. On March 3, 2015, the Department of Child Safety (“DCS”) took temporary physical custody of the Children due to concerns about domestic violence and Mother’s ability to provide stability and care for the Children. DCS petitioned for dependency, specifically alleging J.W. was dependent regarding Father because Father was unwilling or unable to provide proper and effective parental care and control by: (1) neglecting J.W. due to abandonment; (2) failing to provide for J.W.’s basic needs; and (3) exposing J.W. to domestic violence in the home. J.W. and his siblings were placed with a maternal great aunt from June 2015 until May 2017. The Children were then placed

¹ Mother’s parental rights to the Children were severed, and she is not a party to this appeal. A.D. and E.D.’s fathers’ parental rights were also severed, and they did not appeal.

with a foster family. The superior court found J.W. dependent regarding Father in September 2016.

¶4 Prior to DCS's involvement, Father had minimal contact with J.W. and never sought custody of him. When DCS contacted Father, he was living in North Carolina, but "expressed his desire for [J.W.] to be placed with him." DCS initiated two home studies through the Interstate Compact on the Placement of Children ("ICPC"). The first ICPC was closed after Father moved to a different county, and the second was closed due to a lack of communication from Father and multiple canceled visits. Initially, Father had phone contact with J.W. approximately every other week, and he visited J.W. in September and October 2015. However, beginning in November 2015, Father's contact with both DCS and J.W. waned, and after July 2016, Father had no contact with J.W. until a visit in August 2017. Father did not provide J.W. monetary support, cards, gifts, or letters throughout the dependency. He also did not complete domestic violence or parenting classes prior to the severance hearing.

¶5 In December 2016, DCS moved to sever Father's parental rights to J.W. based on abandonment and 15 months time-in-care. *See* Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(1), (8)(c). After a two-day hearing, the superior court terminated Father's parental rights to J.W. The court found Father abandoned J.W. and severance was in J.W.'s best interests.² Father timely appealed, and we have jurisdiction pursuant to A.R.S. § 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶6 We review a court's severance determination for an abuse of discretion. *Mary Lou C. v. ADES*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). 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." *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). Therefore, we view the facts in the light most favorable to affirming the superior court's order "unless no reasonable evidence supports those findings." *Jennifer B. v. ADES*, 189 Ariz. 553, 555 (App. 1997); *see also*

² The superior court found DCS did not prove by clear and convincing evidence the statutory grounds for termination based on 15 months time-in-care.

JASON W. v. DCS, et al.
Decision of the Court

Maricopa County Juv. Action No. JS-500274, 167 Ariz. 1, 4 (1990) (“[Q]uestions of abandonment . . . are questions of fact for resolution by the trial court.”).

¶7 To terminate a parent-child relationship, the court must find at least one statutory ground for severance under A.R.S. § 8-533(B) by clear and convincing evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). The court must also find by a preponderance of the evidence that severance is in the child’s best interests. *Id.* The superior court may terminate a parent’s rights based on abandonment if the parent failed to provide reasonable support and normal supervision and failed to maintain regular contact with the child. A.R.S. § 8-531(1). Failing to maintain a normal parent-child relationship for six months constitutes *prima facie* evidence of abandonment. *Id.* Abandonment is measured by the parent’s conduct, not by their subjective intent. *Michael J. v. ADES*, 196 Ariz. 246, 249, ¶ 18 (2000). “What constitutes reasonable support, regular contact, and normal supervision varies from case to case.” *Id.* at 250, ¶ 20. When “circumstances prevent the . . . [parent] from exercising traditional methods of bonding with his [or her] child, he [or she] must act persistently to establish the relationship however possible and must vigorously assert his [or her] legal rights to the extent necessary.” *Id.* at ¶ 22.

¶8 Citing *Roberto F. v. ADES*, Father argues the superior court erred by finding Father abandoned J.W. because the court did not find Father was unable to properly parent J.W. *See* 232 Ariz. 45, 54, ¶ 42 (App. 2013) (“In any severance proceeding, the material issue facing the court is whether a parent has the ability to properly parent his/her child.”) However, to prove the statutory ground of abandonment, DCS need not prove that a parent is incapable of exercising proper and effective parental care. *See Michael J.*, 196 Ariz. at 249–250, ¶ 18. The requirement that a court must find there is a substantial likelihood that a parent will be unable to exercise proper and effective parental control applies when DCS petitions to terminate a parent’s rights based on 15 months time-in-care. A.R.S. § 8-533(B)(8)(c). Father correctly points out the superior court was “unable to find by clear and convincing evidence that [Father] would not be capable of providing proper and effective care for [J.W.]” That is why the court did not sever Father’s rights to J.W. based on 15 months time-in-care.

¶9 The court did, however, find Father failed: (1) to provide financial support for J.W. or send cards, gifts, or letters; (2) to have any meaningful contact between Father and J.W. as such conduct “was, at best, sporadic;” and, (3) to timely seek to obtain physical custody of J.W. The child was seven-years-old at the time of severance, and the court concluded Father had not been a part of J.W.’s daily life since soon after J.W. was

JASON W. v. DCS, et al.
Decision of the Court

one-year old. Father did not contest the court's findings as to abandonment, which could constitute waiver. *See Christina G. v. ADES*, 227 Ariz. 231, 234, ¶ 14, n.6 (App. 2011) (failure to develop an argument on appeal may constitute waiver). However, we have reviewed the record and sufficient evidence supports the superior court's findings. The superior court did not err by finding Father abandoned J.W.

¶10 Father also argues the superior court erred by finding severance is in J.W.'s best interests. The best-interests inquiry requires the superior court to balance the parent's rights "against the independent and often adverse interests of the child in a safe and stable home life." *Kent K.*, 210 Ariz. at 286, ¶ 35. "[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." *JS-500274*, 167 Ariz. at 5. "When a current placement meets the child's needs and the child's prospective adoption is otherwise legally possible and likely," the superior court may find that severance is in the child's best interests. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12 (2016). However, "a court need not automatically conclude that severance is in a child's best interests just because the child is adoptable." *Id.* at ¶ 14. The superior court must consider the totality of the circumstances when making a best-interests finding. *Dominique M. v. DCS*, 240 Ariz. 96, 99, ¶ 12 (App. 2016).

¶11 The superior court found an adoption plan was in place, J.W. is adoptable even if that adoption plan falls through, and J.W. was bonded with his current placement, which provided him with a loving and nurturing home. Father argues these findings, coupled with the superior court's finding that Father is not incapable of providing proper parental care for J.W., are insufficient to support a best-interests finding. For support, Father relies on *Alma S. v. DCS*, 778 Ariz. Adv. Rep. 24 (App. 2017), a case decided after Father's rights to J.W. were severed. In *Alma S.*, this court emphasized that adoptability and whether a current placement meets a child's needs, without more, is insufficient to establish best interests. 778 Ariz. Adv. Rep. at 32, ¶¶ 36–38. However, in that case, the parent "required little or no counseling on how to improve her parenting skills," a bond existed between the parent and her children, and if the parent's rights were severed, the children would have been split up. *Id.* at ¶ 37.

¶12 In this case, although the superior court did not find Father would be unable to provide proper care for J.W., the court did find Father had only "been marginally involved" in J.W.'s life, and that placing J.W. with Father would cause J.W. to be separated from his siblings, which provides an additional basis to find severance is in J.W.'s best interests. *See*

JASON W. v. DCS, et al.
Decision of the Court

Audra T. v. ADES, 194 Ariz. 376, 378, ¶¶ 6-7 (App. 1998) (the child’s best interests were not to be placed with grandparents with whom the child had no relationship, when the child was currently placed with his sibling in an adoptive home). A DCS caseworker testified J.W. and A.D. were “very bonded together, and they very much care for their sibling [E.D.]. So, separating them would likely have significant effects on them.” The caseworker also testified J.W. does not have a strong relationship with Father. Despite being able to visit and call whenever he could while J.W. was placed with his great aunt, Father visited with J.W. just four times during the pendency of this case: once each in September and October 2015, May 2016, and finally in August 2017. DCS referred Father for supervised visits in June 2017, but the referral was closed out after Father cancelled visits and failed to call to confirm visits. Father’s last phone contact with J.W. was in June 2016.

¶13 The superior court is in the best position to weigh the evidence and sufficient evidence supports the court’s findings here. *See Oscar O.*, 209 Ariz. at 334, ¶ 4. The superior court did not abuse its discretion by finding severance was in J.W.’s best interests.

CONCLUSION

¶14 For the foregoing reasons, we affirm the superior court’s order terminating Father’s parental rights to J.W.



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