IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MACKENZIE W., *Appellant*,

v.

ELLIOTT M., B.W., *Appellees*.

No. 1 CA-JV 18-0001
FILED 8-21-2018

Appeal from the Superior Court in Navajo County
No. S0900SV201700020
The Honorable Michala M. Ruechel, Judge

AFFIRMED

COUNSEL

Riggs Ellsworth & Porter, P.L.C., Show Low
By Michael R. Ellsworth (argued), Joshua G. Crandell
Counsel for Appellant

Coronado Law Firm, PLLC, Lakeside
By Eduardo H. Coronado
Counsel for Appellees

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Diane M. Johnsen joined.

M c M U R D I E, Judge:

¶1 Mackenzie W. ("Mother") appeals the superior court's order declining to terminate the biological father's parental rights to their minor child. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother gave birth to B.W. in February 2016. Elliott M. ("Father") is the biological father of B.W. During Mother's pregnancy with B.W., an order of protection was entered against Father after he assaulted Mother's mother and minor brother. Father was intoxicated during the assault. The order of protection was not modified after B.W.'s birth and expired in January 2017.

¶3 In July 2016, Mother started living with Dillon. Mother and Dillon are engaged and both testified they intend to get married "sometime in 2018." Dillion cares for B.W. and B.W. refers to Dillon as "dad." Dillon testified he would like to adopt B.W., which Mother would like as well.

¶4 Father made no effort to see B.W. until early February 2017, when he asked to meet with the child. Over the next three months, Mother, Father, B.W., and Dillon met without incident approximately six times. Father also made additional attempts to be with B.W. Mother initially agreed to Father participating in B.W.'s life, but changed her mind after a meeting with her lawyer. In May 2017, Father petitioned to establish a formal parenting plan and joint legal decision-making. After the petition was filed, Mother prevented Father from having further contact with B.W.

¶5 In June 2017, Mother petitioned to terminate Father's parental relationship. In her petition, she alleged Father had abandoned B.W. pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) and that termination of Father's parental rights was in B.W.'s best interests. After a hearing, the court denied the petition. Although the court found Mother proved by clear and convincing evidence Father had abandoned B.W., the court concluded termination was not in B.W.'s best interests. Mother 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 The right to custody of one's child is fundamental, but not absolute. *Michael J. v. ADES*, 196 Ariz. 246, 248, ¶¶ 11–12 (2000). Arizona statutes require the superior court to make two findings before ordering severance of parental rights. *Kent K. v. Bobby M.*, 210 Ariz. 279, 280, ¶ 1 (2005); *see also* A.R.S. § 8-533(B). First, the court must find by clear and convincing evidence at least one statutory ground warranting severance. A.R.S. § 8-537(B); *Crystal E. v. DCS*, 241 Ariz. 576, 577, ¶ 5 (App. 2017). Then, the court must determine by a preponderance of the evidence that termination of the parent-child relationship is in the child's best interests. *Shawanee S. v. ADES*, 234 Ariz. 174, 176–77, ¶ 9 (App. 2014). "[A]lthough the best interests of the child alone may not be sufficient to grant termination, they may be sufficient to deny termination." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990).

¶7 We review a court's severance determination for an abuse of discretion. *Mary Lou C. v. ADES*, 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 resolve disputed facts," *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004), we will affirm the court's decision unless it abused its discretion by making factual findings that are clearly erroneous; "that is, unless there is no reasonable evidence to support them," *Xavier R. v. Joseph R.*, 230 Ariz. 96, 100, ¶ 11 (App. 2012) (quoting *Audra T. v. ADES*, 194 Ariz. 376, 377, ¶ 2 (App. 1998)).

¶8 On appeal, neither party challenges the court's conclusion that Father abandoned the child pursuant to A.R.S. § 8-533(B)(1). *But cf. Calvin B. v. Brittany B.*, 232 Ariz. 292 (App. 2013) (parent may not restrict the other parent from interacting with their child and then petition to terminate based on abandonment). Both parties have, thus, acknowledged the validity of the finding and waived any argument on appeal regarding abandonment. *See Britz v. Kinsvater*, 87 Ariz. 385, 388 (1960) (by failing to challenge the accuracy of findings, a party concedes the accuracy on appeal).

I. The Court Acted Within Its Discretion When It Concluded Termination of Father's Parental Rights Was *Not* in B.W.'s Best Interests.

¶9 Mother presents three closely related issues on appeal. First, Mother argues the superior court abused its discretion when it found termination of Father's rights was *not* in B.W.'s best interests. Second, Mother contends the evidence required the court to conclude termination of Father's rights *was* in B.W.'s best interests. Third, Mother challenges the court's factual finding that Dillon would not be available to adopt B.W. for "a significant time."

¶10 When making a best-interests finding, the superior court must consider the totality of the circumstances, *Dominique M. v. DCS*, 240 Ariz. 96, 99, ¶ 12 (App. 2016), which requires a "delicate balancing of the child's interests," *Kent K.*, 210 Ariz. at 288, ¶ 41. "[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.

A. Reasonable Evidence Supported the Court's Conclusion that Termination of Father's Parental Rights Was Not in B.W.'s Best Interests.

¶11 Mother argues the court erroneously concluded the termination was *not* in B.W.'s best interests because the court "failed to recognize its own findings [of fact]." In support, Mother argues the court inadequately considered the negative effects Father's abandonment had on B.W. We disagree.

¶12 Our supreme court stated in *Demetrius L.* that a court *cannot* "assume that a child will benefit from a termination simply because he has been abandoned." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 14 (2016) (quoting *JS–500274,* 167 Ariz. at 5–6). In the best-interests inquiry, courts may presume only that "the interests of the parent and child *diverge* because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Demetrius L.*, 239 Ariz. at 4, ¶ 15 (emphasis added) (quoting *Kent K.,* 210 Ariz. at 286, ¶ 35). Once a court finds a parent unfit, the court then proceeds to balance the unfit parent's diluted parental "interest in the care and custody of his or her child . . . against the independent and often adverse interests of the child in a safe and stable home life." *Kent K.*, 210 Ariz. at 286, ¶ 35. At this stage, the primary focus shifts from the parent's interests to the interests of the child. *See id.* at 287, ¶ 37.

¶13 Although we observed in *Maricopa County Juvenile Action No. JS–6831* that "[i]n most cases, the presence of a statutory ground will have a negative effect on the children[,]" which would tend to support a best-interests finding, we held that the legislature intended the "court to weigh the *overall* best interests of the child against the objective behavior of the parent which constitutes the statutory ground." 155 Ariz. 556, 559 (App. 1988) (emphasis added). In other words, the finding of abandonment, by itself, does not compel a finding that severance is in the child's best interests. Mother's reliance on our observation in *JS–6831*, even as restated by our supreme court in *Demetrius L.*, ignores the superior court's obligation to balance B.W.'s overall interests.

¶14 In balancing the child's best interests, the court may use findings of a parent's sincere and well-meaning post-petition attempts to reestablish a parental relationship and the evidence upon which they are based. *JS-500274*, 167 Ariz. at 8. Here, the court found Father was now "able and willing to nurture and support the relationship and provide for the child." Father was steadily employed, no longer had alcohol-related issues, and his family members were also "willing to provide nurturing" care. The court also weighed two other findings against severance: (1) Mother and Dillon were not married, meaning (2) "there is not a step-parent *immediately available* to adopt the child at this time and who may not be available to adopt for a *significant period of time*." (Emphasis added). Dillon's availability to adopt B.W. is discussed in part C below. *See* ¶¶ 19-21.

¶15 During the hearing, the court also explained severance may not be in B.W.'s bests interests "if [B.W.] can have a supportive, loving step father who's there day in and day out and a father who is there supporting him and being there for him as a parent not living in the home." That observation is consistent with our statement in *JS-500274* that "if we were to order termination, we might be denying the child a 'sincere' father for a mere speculative potential benefit that might or might not materialize sometime in the future." 167 Ariz. at 7.

B. Under the Facts, the Court Was Not Required to Find Termination Was in B.W.'s Best Interests.

¶16 Mother contends, however, that three significant facts weighed against the court's denial of termination: B.W.'s adoptability, her and Dillon's intention to marry in 2018, and their intent, after they wed, that Dillon will adopt B.W. upon the termination of Father's parental rights. Mother claims the court was required to conclude that severance of Father's parental rights *was* in B.W.'s best interests based upon these facts.

¶17 In her brief and at oral argument, Mother relied heavily on our decision in *Oscar O.* to support her argument. In *Oscar O.*, this court reversed the superior court's order finding severance was not in the children's best interests after it found grounds for severance existed. 209 Ariz. at 337, ¶ 17. This court found there was no reasonable evidence in the record "to suggest that severance and adoption were not in [the children's] best interests, and [there was] clear, convincing, and virtually uncontroverted evidence in the record to support just the opposite conclusion." *Id.* Unlike the case before us, in *Oscar O.* neither of the children's parents were present in their lives; the children had relatives who were "willing and immediately available to adopt them"; the father had not remedied the issues that led to severance; and the superior court found returning the children to the father would not be in their best interests or safe. *Id.* at 333–35, ¶¶ 3, 7, 9. In this case, however, both Mother and Father are present in B.W.'s life and willing to parent him; the superior court found it appeared Father no longer had alcohol-related issues at the time of the severance hearing; and there is no evidence in the record that continuing Father's relationship with B.W. would be detrimental to the child. *See id.* at 337, ¶ 16; *JS-6831*, 155 Ariz. at 559.

¶18 "The combined effect of the fundamental character of a parent's right to his child and the severity and permanence of termination dictates that the court sever the parent-child relationship *only* in the most extraordinary circumstances, when all other efforts to preserve the relationship have failed." *Mary Ellen C. v. ADES*, 193 Ariz. 185, 192, ¶ 32 (App. 1999) (emphasis added) (quoting *Maricopa County Juv. Action No. JA-33794*, 171 Ariz. 90, 91–92 (App. 1991)). Although B.W.'s current placement with Mother and Dillon meets his needs and his prospective adoption by Dillon may be "otherwise legally possible and likely," the superior court has discretion, not an obligation, to find that severance is in the child's best interests. *See Demetrius L.*, 239 Ariz. at 4, ¶ 12.

C. The Court Acted Within Its Discretion in Weighing Dillon's Availability to Adopt B.W.

¶19 Lastly, Mother challenges the court's factual finding that Dillon would not be able to adopt B.W. for "a significant period of time." Mother further argues that as no "firm plan for adoption" is necessary,

fifteen months between the trial and a contemplated wedding is not a significant period of time in light of B.W.'s very young age.[1]

¶20 Even immediate availability of an adoptive placement, however, is but "*[o]ne factor* the court may properly consider in favor of severance." *Jesus M. v. ADES*, 203 Ariz. 278, 282, ¶ 14 (App. 2002) (emphasis added). Similarly, adoptability alone does not mean that severance is in a child's best interests. *Lawrence R. v. ADES*, 217 Ariz. 585, 588, ¶ 11 (App. 2008); *see also Demetrius L.*, 239 Ariz. at 4, ¶ 14 ("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.").

¶21 Here, the court weighed Dillon's testimony and credibility against the totality of the circumstances. *See Dominique M.*, 240 Ariz. at 99, ¶ 12. Not only could Dillon not adopt B.W. immediately, which Mother does not dispute, it would be several months, according to Mother and Dillon's estimation, before he could adopt B.W. Because Mother is B.W.'s biological parent, her parental rights would be severed by Dillon's adoption if they were not married. *See* A.R.S. § 8-117(B)–(C) (adoption completely severs the relationship of parent and child between the adopted child and the persons who were the child's parents before entry of the decree of adoption, unless "the adoption is by the spouse of the child's parent"); *see also Pima County Juv. Adoption Action No. B-13795*, 176 Ariz. 210, 211 (App. 1993) ("[T]he only exception to severance of the natural parent's rights following adoption occur[s] where the natural parent is married to the child's adoptive parent."). Considering Father's present ability and willingness to nurture and support B.W., as well as the additional nurturing available from Father's relatives, we conclude reasonable evidence supports the court's finding. *See Xavier R.*, 230 Ariz. at 100, ¶ 11; *see also Jesus M.*, 203 Ariz. at 282, ¶ 13 ("We view the evidence, and draw all reasonable inferences from it, in favor of supporting the findings of the trial court.").

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[1] The court's assessment that it would be "a significant period of time" before Dillon is able to adopt B.W. appears accurate. At oral argument on August 15, 2018, almost eight months after the court entered its order finding termination was not in B.W.'s best interests, Mother's counsel informed this court that Mother and Dillon were still not married.

CONCLUSION

¶22 Because the record reasonably supports the court's findings, including resolution of conflicting facts, and because the court is in the best position to weigh evidence and judge the credibility of witnesses, we affirm the court's denial of the petition to terminate Father's parental rights. *See JS-500274*, 167 Ariz. at 5; *see also Xavier R.*, 230 Ariz. at 100, ¶ 11; *Oscar O.*, 209 Ariz. at 334, ¶ 4.

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