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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

MICHAELA F., *Appellant*,

v.

BENJAMIN A., T.A., *Appellees*.

No. 1 CA-JV 18-0040
FILED 8-14-2018

Appeal from the Superior Court in Maricopa County
No. JS518137
The Honorable Arthur T. Anderson, Judge

AFFIRMED

COUNSEL

Rubin & Ansel, PLLC, Scottsdale
By Yvette D. Ansel
Counsel for Appellant

Denise L. Carroll, Esq., Scottsdale
By Denise Lynn Carroll
Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Kenton D. Jones and Judge Jon W. Thompson joined.

C A T T A N I, Judge:

¶1 Michaela F. (“Aunt”) appeals from the superior court’s denial of her private petition to terminate the parent-child relationship between Benjamin A. (“Father”) and his daughter, T.A. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father and Melissa G. (“Mother”) are the biological parents of T.A., born in February 2012. Father, Mother, and T.A. lived together initially. Father moved out in the fall of 2012 when he and Mother broke up, but he still saw T.A. every day for the next few months.

¶3 By early 2013, Mother and Father’s ongoing interactions soured, and, following an altercation, Mother took out an order of protection against him. The protective order prohibited Father from contacting Mother, but allowed him to have contact with T.A. Mother’s parents facilitated visits by driving T.A. to see Father. Mother and Father exercised roughly equal parenting time, although Mother began restricting Father’s access to T.A. during that period.

¶4 In May 2013, Mother reported to the Department of Child Safety (“DCS”) (then known as Child Protective Services) that T.A. was showing sexualized behaviors after a visit with Father, and Mother alleged that T.A. had been sexually abused. With that, Mother stopped allowing Father any contact with T.A. Although the record does not provide a precise timeline for the months that followed, both DCS and law enforcement investigated Mother’s allegations of sexual abuse, and each concluded the allegations were unfounded.

¶5 Meanwhile, at the end of May 2013, Father filed a petition in family court to establish legal decision-making, parenting time, and child support. In the fall, the family court ordered that Father have supervised visitation with T.A., and Father saw T.A. regularly from October through December 2013.

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¶6 In January 2014, after considering evidence about Mother's allegations and the resulting investigations, the family court issued its final decision, expressly finding that both parents had appropriate relationships with T.A., and further noting its concern that Mother continued to seek restrictions on Father's time with T.A. "in spite of significant evidence that Father has not harmed the child[.]" The court awarded the parties joint legal decision-making and equal parenting time (3 ½ days each per week). The order directed Mother and Father to communicate only by email and authorized one daily phone call to speak with T.A. The order also fixed a neutral location for parenting time exchanges, and required the parents to work with a parenting coordinator to resolve disputes before seeking court intervention.

¶7 Mother failed to show up for the very first scheduled exchange, and Father did not see T.A. for more than two and a half years thereafter. Father emailed Mother repeatedly, asking about T.A. and asking that Mother allow him to see his daughter. He also called Mother every day until her phone was disconnected. For the most part, Mother did not respond to Father's emails and calls. After months of silence, Mother briefly resurfaced by email in late July 2014, stating that Father could not visit T.A. until the DCS investigation – which had ended in mid-2013 – had been "fully completed." Although Mother again stopped responding soon thereafter, Father continued to email her, albeit less frequently as the months and years went by.

¶8 Father continued to pay child support for T.A., withdrawn directly from his paychecks. He also kept gifts and cards for T.A. in the room he maintained for her, but did not have an address to which to send them. Father continued to search for T.A. and Mother, even to the point of knocking on doors (with a police escort) and by working through the appointed parenting coordinator.

¶9 In mid-2014, Father petitioned the family court to enforce the parenting time order, but neither he nor Mother appeared for the resulting enforcement hearing. Although Father attempted to refile, by that time he had received confirmation that Mother no longer lived at her last known address, and he lacked the financial resources to file additional enforcement proceedings knowing that he would be unable to serve Mother. Thereafter, Father continued to email Mother and sought police assistance to escort him to potential addresses, but was unsuccessful in locating Mother. He was unable to find T.A. until the severance petition was filed in September 2016.

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¶10 Meanwhile, unbeknownst to Father, Mother struggled with drug addiction and relied on her family’s help to care for T.A. Mother left T.A. with her mother and her sister (Aunt) from April to September 2014 to go through a drug rehabilitation program. Mother cared for T.A. from September 2014 to November 2015, when she ultimately acknowledged she was struggling and asked Aunt to take custody of T.A. T.A. remained with Aunt thereafter, and by all accounts Aunt provided her a safe, healthy, and happy home.

¶11 In September 2016, Aunt filed a petition to terminate Mother’s and Father’s parental rights. Mother agreed to relinquish her parental rights. *See* Ariz. Rev. Stat. (“A.R.S.”) § 8-533(B)(7). Father, however, contested severance, challenging the petition’s allegation that he had abandoned T.A. *See* A.R.S. § 8-533(B)(1). After a four-day termination adjudication hearing, the superior court denied severance, finding that Father’s repeated attempts to contact Mother (thwarted by Mother’s own actions) demonstrated he had not abandoned T.A. The court also declined to sever Mother’s parental rights. Even though the court found grounds for severance based upon Mother’s consent, the court further found that severing Mother’s rights—leaving Father as the only legal parent—would not serve T.A.’s best interests given T.A.’s relationship with Aunt and other members of Mother’s family. The court further ordered that DCS investigate whether T.A. was dependent as to Father.

¶12 Aunt timely appealed the ruling denying her petition to terminate Father’s parental rights. We have jurisdiction under A.R.S. § 8-235(A).

DISCUSSION

¶13 The superior court is authorized to terminate a parent–child relationship if clear and convincing evidence establishes at least one statutory ground for severance, and a preponderance of the evidence shows severance to be in the child’s best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). We review a severance ruling for an abuse of discretion, deferring to the superior court’s credibility determinations and factual findings. *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004); *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002). Under this standard, we “will not second-guess or substitute our judgment for that of the trial court” as long as reasonable evidence supports the court’s conclusions. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188 (App. 1992); *Maricopa Cty. Juv. Action No. JD-500200*, 163 Ariz. 457, 461 (App. 1989).

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¶14 One statutory ground for severance is that “the parent has abandoned the child.” A.R.S. § 8-533(B)(1). “Abandonment” is defined as

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.

A.R.S. § 8-531(1).

¶15 Abandonment is assessed objectively based on the parent’s conduct, not his subjective intent. *See Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, 249–50, ¶ 18 (2000). Accordingly, when faced with obstacles to a continuing parental relationship, a parent must “act persistently to establish the relationship however possible and must vigorously assert his legal rights.” *Id.* at 250, ¶ 22 (citations omitted). But we have also recognized that “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. v. Brittany B.*, 232 Ariz. 292, 293–94, ¶ 1 (App. 2013) (as modified).

¶16 Although there is evidence from which the superior court could have determined that Father did not make sufficient efforts to maintain contact with T.A., the record also supports the court’s conclusion that Father had not abandoned T.A., but rather that Mother’s interference had thwarted his efforts to remain in his daughter’s life. Father exercised approximately equal parenting time until Mother accused him of sexual abuse in mid-2013 and stopped allowing contact with T.A. In order to resume his relationship with T.A., Father cooperated in the investigations by DCS and law enforcement that ultimately exonerated him.

¶17 Around the same time, Father sought the family court’s assistance to formally establish parenting time. He took full advantage of supervised visitation to maintain his relationship with T.A. pending the family court’s final decision. And that decision granted him joint legal decision-making and equal parenting time, but Mother refused to comply.

¶18 Father then made repeated but futile attempts to contact Mother by email and by phone (within the bounds of communication

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authorized by the family court's decision) to see his daughter. Although Father emailed less frequently in 2015 and 2016 – after Mother had already failed to respond for months – he nevertheless continued to attempt to reach her. He unsuccessfully attempted to make contact in person – taking care to bring a police escort or other third party to supervise – and ultimately learned Mother had moved from her last known address in mid-2014. Even while Mother continued to withhold contact with T.A., Father continued to pay child support¹ and continued to accumulate cards and gifts for T.A. This provided an ample basis for the court to conclude that Father had not abandoned T.A.

¶19 Aunt argues that the court erred, however, because Father could have done more: he could have completed (or refiled) his petition to enforce the family court order or hired a lawyer to assist him; he could have hired an investigator or sought more assistance from the police; or he could have contacted Mother's family. *See Yuma Cty. Juv. Action No. J-87-119*, 161 Ariz. 537, 540 (App. 1989). Even assuming all of these steps were possible notwithstanding Father's limited financial resources, the fact that Father's failure to take all possible steps *could* support an abandonment finding does not establish that the court abused its discretion by finding otherwise. *See Mary Lou C.*, 207 Ariz. at 47, ¶ 8.

¶20 Moreover, Father made far more efforts to contact Mother and reunite with T.A. than did the father in the case on which Aunt relies. In *J-87-119*, the superior court terminated a father's parental rights based on abandonment after he made only one attempt to contact the mother (a single phone call to her parents the first week after she left) over the course of eight years. 161 Ariz. at 539. A divided panel of this court affirmed, deferring to the superior court's discretionary determination and noting that despite uncontroverted evidence that the mother attempted to conceal the child, the father failed to pursue any potential avenues – for example, contacting the mother's family, local authorities, legal counsel, or an investigator – to find his child: "The most salient point is that the father's failure to do anything except make one telephone call is powerful evidence of his intent." *Id.* at 540.

¶21 As described above, Father made repeated attempts over the course of years to contact Mother by email, by phone, and in person. And

¹ Although Aunt notes that she (and thus T.A.) did not receive any support from Father, she conceded – based on paystub evidence – that Father had been making child support payments, which apparently had not been passed along by Mother.

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the court could reasonably accept Father's testimony that he hesitated to contact Mother's family in the wake of Mother's unfounded allegations of sexual abuse. *See Jesus M.*, 203 Ariz. at 280, ¶ 4. Indeed, the members of Mother's family who testified at trial remained under the impression that the sexual abuse allegations had been substantiated or that the investigation was ongoing, and they were generally unaware that the family court had awarded Father equal parenting time.

¶22 Accordingly, we affirm the superior court's ruling finding that Father had not abandoned T.A. and declining to terminate Father's parental rights on that basis.

CONCLUSION

¶23 The judgment is affirmed.



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