IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ONYX T., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, D.N., *Appellees*.

No. 1 CA-JV 20-0095
FILED 9-22-2020

Appeal from the Superior Court in Mohave County
No. S8015JD201800075
The Honorable Megan A. McCoy, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Harris & Winger, PC, Flagstaff
By Chad Joshua Winger
Counsel for Appellant Onyx T.

Arizona Attorney General's Office, Mesa
By Amanda Adams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jennifer B. Campbell and Judge Lawrence F. Winthrop joined.

S W A N N, Chief Judge:

¶1 Onyx T. ("Father") appeals the superior court's order terminating his parental rights as to his son, D.N. Father contends that (1) the termination statute is unconstitutional, (2) the superior court did not make the requisite findings to support neglect, and (3) service by publication was insufficient. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Jessica N. ("Mother")[1] gave birth to D.N. in March 2012. While pregnant, Mother informed Father that he was D.N.'s biological parent, and Father was present at the hospital for the birth. Nevertheless, Father did not sign the birth certificate or take other steps to establish paternity because he doubted whether he was the biological father. After D.N.'s birth, Father had no further contact with Mother or D.N.

¶3 Over the next five years, Mother gave birth to three additional children. In November 2018, the Department of Child Safety ("DCS") began receiving reports that Mother had "farmed out" the children and was unable to meet their basic needs. Based on those reports of neglect, DCS filed a dependency petition against Mother and "John Doe," because Father's identity and whereabouts were unknown.

¶4 DCS first became aware that Father might be D.N.'s biological parent in November 2018. DCS unsuccessfully attempted to locate Father through a parent-locate search. DCS also asked Mother for Father's contact information, which Mother did not provide. In March 2019, after service by publication, the superior court adjudicated D.N. dependent as to "John Doe."

[1] Mother was dismissed as a party to this appeal because she failed to file an opening brief. Facts related to her are therefore included only as necessary to establish the issues on appeal.

¶5 Mother again identified Father as D.N.'s biological parent to DCS in April 2019. DCS then amended its dependency petition to include Father, asserting that he had failed to provide "any care and control for the child for several years." DCS again was unable to locate Father. In September 2019, Mother contacted Father online and informed him about the dependency petition. One month later, Father appeared as a party. D.N.'s case plan was subsequently changed from reunification to severance and adoption.

¶6 Father participated in paternity testing, which confirmed that he was D.N.'s biological father. Thereafter, Father requested visitation, but DCS denied that request. After an evidentiary hearing held on the matter, the superior court relieved DCS of its obligation to provide rehabilitative services or visitation. Father did not appeal from that ruling.

¶7 In November 2019, DCS moved to terminate Father's parental rights, alleging abandonment and neglect as grounds for termination. After a two-day trial, the superior court found that termination was supported by both asserted grounds and that termination would be in D.N.'s best interests. Father appeals.

DISCUSSION

¶8 As a preliminary matter, we note that Father does not contest the superior court's statutory findings of abandonment or best interests. Instead, Father contends that the termination statute is unconstitutional as applied to him and that the superior court violated his constitutional rights by failing to make explicit, factual findings regarding DCS's efforts to locate him. Father further contends that the superior court erred by terminating his parental rights based on neglect without finding that he caused or failed to protect D.N. from serious physical or emotional injury under A.R.S. § 8-201(33) and (34) and urges us to overturn, clarify, or reverse *E.R. v. Department of Child Safety*, 237 Ariz. 56 (App. 2015).

¶9 The superior court may terminate a parent-child relationship if clear and convincing evidence establishes at least one statutory ground for termination and a preponderance of the evidence shows severance is 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, accepting the court's factual findings unless clearly erroneous and viewing the evidence in the light most favorable to sustaining the court's ruling. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2 (App. 2008); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8

(App. 2004). We defer to the superior court's credibility determinations. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

I. FATHER HAS WAIVED THE ARGUMENT THAT THE TERMINATION STATUTE IS UNCONSTITUTIONAL.

¶10 Father contends that the superior court violated his constitutional rights by failing to make specific factual findings regarding DCS's efforts to locate him or provide him with rehabilitative services. Father further contends that the superior court erred by relieving DCS of its obligation to provide visitation and services to him.

¶11 But Father failed to raise this argument below, thereby waiving it. *See Stokes v. Stokes*, 143 Ariz. 590, 592 (App. 1984). We further note that Father failed to appeal from the superior court's minute entry relieving DCS of its duty to provide reunification services. *See* Ariz. R. P. Juv. Ct. 57; A.R.S § 8-846(F). We therefore lack jurisdiction to consider Father's arguments challenging the court's denial of visitation and rehabilitative services. *See* Ariz. R. P. Juv. Ct. 103(A) ("An aggrieved party may appeal from a final order of the juvenile court to the court of appeals."); *Francisco F. v. Ariz. Dep't of Econ. Sec.*, 228 Ariz. 379, 382, ¶ 8 (App. 2011) (concluding that an order relieving the state of its duty to provide reunification services is a final, appealable order).[2]

II. BECAUSE REASONABLE EVIDENCE SUPPORTS THE SUPERIOR COURT'S FINDING THAT FATHER ABANDONED D.N., WE NEED NOT DECIDE WHETHER SUFFICIENT EVIDENCE SUPPORTS THE FINDING OF NEGLECT.

¶12 Father contends that insufficient evidence supported the finding of neglect because DCS failed to present any "evidence of serious

---

[2] Father also failed to provide us with a transcript of the evidentiary hearing related to this matter, and we therefore presume that it would support the court's decision to relieve DCS from its obligation to provide Father with visitation and rehabilitative services. *See* Ariz. R. P. Juv. Ct. 104(E) (stating that appellant may designate transcripts that are not automatically included for appellate review); *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."); *Maricopa Cty. Juv. Action No. J-74449A*, 20 Ariz. App. 249, 251 (App. 1973) (finding that the party challenging the sufficiency of the evidence in a juvenile case has the burden to include a transcript for appellate review).

physical or emotional injury nor medical nor psychological diagnoses." He further contends that the superior court failed to make necessary neglect findings regarding unreasonable risk of harm. He urges us to "overturn[], clarif[y], or reverse[]" *E.R. v. Department of Child Safety*, in which this court held that conduct other than serious physical or emotional injury may constitute neglect under A.R.S. § 8-533(B)(2). *See* 237 Ariz. 56, 59, ¶¶ 12–13 (App. 2015). But because Father does not contest the abandonment ground for termination and reasonable evidence supports the superior court's finding that Father abandoned D.N., we need not reach this issue. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 49, ¶ 14 (App. 2004).

¶13 The superior court may terminate parental rights when a "parent has abandoned [his or her] child." A.R.S. § 8-533(B)(1). Abandonment is defined as:

> [T]he 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). Whether a parent has abandoned his or her child requires an objective analysis of the parent's conduct, not an analysis of the parent's subjective intent. *Michael J. v. Ariz. Dep't of Econ Sec.*, 196 Ariz. 247, 250, ¶ 18 (2000).

¶14 Here, Father did not have contact with D.N. for seven years. Mother told Father that he was D.N.'s biological parent before D.N. was born, and Father was present at the hospital during the birth. But he did not thereafter assert his parental rights or attempt to establish paternity. D.N. told DCS that Father was "stupid and . . . doesn't care about [him]," and D.N. identifies another man as his father. And although DCS encouraged Father to send D.N. gifts, Father failed to do so. The DCS case worker testified that severance would be in D.N.'s best interests because it would promote stability and permanency. Accordingly, sufficient evidence supports the superior court's order terminating Father's parental rights on the ground of abandonment. We therefore need not decide whether sufficient evidence supported the finding of neglect or whether the superior court made the requisite findings on that ground.

III. FATHER RECEIVED ACTUAL NOTICE OF THE TERMINATION PROCEEDINGS.

¶15 Father contends that DCS failed to make adequate efforts to locate him and that service by publication was improper.

¶16 "In severance proceedings, service of process need not be sufficient to confer *in personam* jurisdiction over the adverse party so long as it otherwise comports to service of process in civil actions." *Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. 288, 290 (App. 1991). A parent whose residence is unknown may be served by publication. *See* Ariz. R. Civ. P. 4.1(l). Service by publication is appropriate if "the serving party, despite reasonably diligent efforts, has been unable to ascertain the person's current address" and "service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement." *Id.* "Before resorting to service by publication, a party must file an affidavit setting forth facts indicating it made a due diligent effort to locate an opposing party to effect personal service." *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 261 (App. 1990).

¶17 Here, DCS properly served Father by publication. It complied with Arizona Rule of Civil Procedure 4.1(l) by filing an affidavit asserting that service by publication was "the best means practicable because [Father's] present residence [was] unknown." DCS avowed that it could not conduct a diligent search investigation without additional information like Father's address, date of birth, and social security information.

¶18 Father also implies that because Mother was able to find Father on social media using a simple search, DCS should have done the same. But Mother testified that it "took [her] a little bit" to find him and that she "had to search for him." She also testified that she did not have any of Father's contact information to provide to DCS prior to September 2019. Father appeared as a party one month later, and he received full procedural due process.

¶19 Father had actual notice of the termination proceedings because he was present at the hearing in which D.N.'s case plan was changed from reunification to severance and adoption. Father was also present for all subsequent proceedings, including the termination hearing in which he testified. And Father was present at D.N.'s birth and was aware that he could be the biological parent, but Father failed to take any steps to establish paternity or assert his parental rights. *See 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."). We find no error.

CONCLUSION

¶20 Because reasonable evidence supports the superior court's order terminating Father's parental rights to D.N., we affirm.

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