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CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06-29-2010
PHILIP G. URRY, CLERK
BY: GH

STEPHANIE L., ADAM E., Sr.,) 1 CA-JV 10-0007
)
Appellants,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, ADAM E., Jr.,) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
Appellees.) ARCAP 28)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD15974

The Honorable Cathy M. Holt, Judge, Retired

AFFIRMED

The Stavris Law Firm, PLLC Scottsdale
by Alison Stavris
Attorney for Appellant Stephanie L.

Popilek & Jones, P.A. Scottsdale
by John L. Popilek
Attorney for Appellant Adam E., Sr.

Terry Goddard, Arizona Attorney General Mesa
by Amanda Holguin, Assistant Attorney General
Attorneys for Appellees.

B A R K E R, Judge

¶1 Appellants Stephanie L. ("Mother") and Adam E., Sr. ("Father") appeal the juvenile court's order terminating their parental rights to their son, Adam E., Jr. ("Adam"). Finding no error, we affirm.

Facts and Procedural History

¶2 Mother and Father are the unmarried biological parents of Adam, who was born in April 2008. On June 10, 2008, Child Protective Services ("CPS"), a division of the Arizona Department of Economic Security ("ADES"), received a report that Mother purposefully dropped Adam on the floor of Father's apartment during an argument with Father the previous day. Father immediately took Adam to the emergency room where he was treated and diagnosed as having a small contusion on the back of the skull. On June 13, 2008, CPS took temporary custody of Adam because of imminent risk from dangerous home conditions and domestic violence.

¶3 Four days later, CPS filed a dependency petition alleging (1) Mother was unable to parent due to physical abuse, domestic violence with Father in the presence of Adam, ongoing dependency with her daughter,¹ and ongoing

¹ Father is not the biological father of Mother's daughter. On February 23, 2009, the juvenile court severed Mother's parental rights to daughter pursuant to Arizona

substance abuse; and (2) Father was unable to parent due to domestic violence with Mother in the presence of Adam and use of illegal substances. Mother waived her right to contest dependency, and the court found Adam dependent as to Mother. After a contested dependency hearing, the court also found Adam dependent as to Father. The court set the case plan as family reunification and found the services offered to Father were necessary and reasonable. The services offered to Father included a psychological evaluation, self referral to Magellan, parent aide services, urinalysis testing, and TERROS substance abuse assessment and treatment. Father was also required to maintain stable housing and employment. Father missed scheduled appointments, completed none of the requested services,² and made sporadic visits with Adam.

¶14 CPS offered Mother substance-abuse services, random drug testing, domestic violence counseling, a self-referral to Magellan for mental health services, transportation, parenting classes, parent-aide services, and supervised visits with Adam. Mother was also required

Revised Statutes ("A.R.S.") section 8-533(B)(1), (B)(8)(a) (Supp. 2009).

² After the termination motion was filed, Father completed a class on infant brain development, but this class was not required by CPS.

to obtain and maintain stable housing and employment. In January 2009, Mother was homeless and was not participating in any services. Mother completed a psychological evaluation prior to CPS taking Adam and briefly participated in parent aide services but failed to comply with the other required services. Mother never visited Adam, and she failed to maintain regular contact with CPS. Mother was often homeless or moving from place to place and by May 2009 was detained in a Florence prison by Immigration and Customs Enforcement ("ICE") following incarceration on charges of prostitution.

¶15 On June 12, 2009, ADES filed a motion to terminate Mother's and Father's parental rights to Adam. Following a three-day trial, the juvenile court severed Father's parental rights because he abandoned Adam pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2009) and had substantially neglected or willfully refused to remedy the circumstances causing Adam's out-of-home placement for nine months or longer pursuant to A.R.S. § 8-533(B)(8)(a). The juvenile court severed Mother's parental rights because Mother abandoned Adam under A.R.S. § 8-533(B)(1), and had substantially neglected or willfully refused to remedy the circumstances causing Adam to remain in out-of-home placement for nine months or longer under

A.R.S. § 8-533(B)(8)(a), and had her parental rights to another child severed within the preceding two years for the same cause under A.R.S. § 8-533(B)(10). The juvenile court also found severance was in Adam's best interest. Mother and Father timely filed notices of appeal.

¶6 We have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21 (2003), and 12-2101(B) (2003).

Discussion

¶7 We view the facts and all reasonable inferences in the light most favorable to upholding the juvenile court's order. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). The juvenile court properly severs parental rights when (1) clear and convincing evidence proves a statutory ground for termination and (2) a preponderance of the evidence shows severance is in the best interests of the child. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 449, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). We review for an abuse of discretion and will reverse the juvenile court's order if no reasonable evidence supports its factual findings. *Id.* at 451, ¶ 19, 153 P.3d at 1080; *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93, ¶ 3, 210 P.3d 1263, 1264 (App. 2009).

1. Father's Parental Rights

A. Statutory Grounds for Severance

¶18 Father argues severance of his parental rights was clearly erroneous because the trial court failed to consider several mitigating circumstances. In particular, Father contends (1) he was "marginally advised" of the services he needed to complete in order to reunite with Adam, (2) he visited Adam six or seven times, (3) it was difficult to communicate with the CPS case manager because of telephone issues, and (4) he maintained employment and actively parented his two other children.

¶19 Pursuant to A.R.S. § 8-533(B), termination of parental rights is appropriate when:

1. [T]he parent has abandoned the child[;] [or]

. . . .

8. [T]he child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that either of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to § 8-806 and the parent has

substantially neglected or willfully refused to remedy the circumstances which cause the child to be in an out-of-home placement.

A.R.S. § 8-533(B)(1), (8)(a).

¶10 As required by A.R.S. § 8-533(B)(8)(A), CPS offered reunification services to Father beginning in June 2008, which was approximately one year prior to the filing of the motion to sever Father's parental rights for failing to remedy the circumstances causing Adam's out-of-home placement. Unlike the obstacles facing some parents in termination proceedings, Father was required to do very little to reunite with Adam. See *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 253, ¶ 3, 159 P.3d 562, 563 (App. 2007) (teenage mother had mental deficiency); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 46, ¶¶ 12-13, 83 P.3d 43, 48 (App. 2004) (mother was incarcerated and had a twelve-year history of substance abuse). The services offered to Father included a psychological evaluation, self referral to Magellan, parent aide services, urinalysis testing, and TERROS substance abuse assessment and treatment. Father could have completed the services offered to him and been reunited with Adam but chose not to do so.

¶11 During a June 2008 meeting with Father, the CPS case manager identified the required services for reunification, but Father refused to participate in services until a test established his paternity.³ In September 2008, the results of a paternity test showed Father was Adam's biological Father. In December 2008, after the juvenile court found Adam dependent to Father and approved the reunification services offered to Father, the case manager also gave Father a copy of the court's minute entry from the dependency hearing, which specified the required services.

³ Father, relying on *Pima County Juvenile Severance Action No. S-114487 v. Adam*, 179 Ariz. 86, 876 P.2d 1121 (1994), asserts that the court erred in considering his conduct prior to the establishment of paternity. We disagree. In *S-114487*, the court stated that "[o]nly if paternity is legally established and the unwed father seeks custody does he have the right to provide emotional support and receive the corresponding benefits of a parental relationship." *Id.* at 96, 876 P.2d at 1131. Father accordingly asserts that it was inappropriate to consider his conduct prior to the establishment of paternity. He is wrong. The next sentence in *S-114487* makes this clear: "Thus, because the unwed father has no immediate and obvious legal ties to the child, *he must act* to establish his parent-child relationship." *Id.* (emphasis added). Our supreme court went on to state: "Thus, in whatever manner we apply the statute's language to termination proceedings against an unwed father with no parental relationship, the message, put simply, is this: *do something*, because conduct speaks louder than words or subjective intent." *Id.* at 97, 876 P.2d at 1132 (emphasis added). Thus, the trial court did not err in considering Father's lack of action prior to the establishment of a paternity test.

¶12 The CPS case manager scheduled two psychological consultations and twice referred Father to substance-abuse services, but Father failed to participate in the services. In May 2009, Father had not visited Adam in six months. Despite problems with the case manager's telephone from May 2009 to August 2009, Father had been informed of the services required to reunite with Adam since June 2008 and could have found a way to complete the services. Moreover, Father failed to complete any services before May 2009, when the case manager's telephone functioned properly.

¶13 Father maintained at trial that he was employed throughout the proceedings, but he repeatedly failed to submit proof of employment to CPS. Father also testified that he parented his daughter and provided child support to his son in Louisiana. Father contends this shows he is a good father. The juvenile court, however, interpreted this as evidence that Father had assumed parental responsibility for his other children but had failed to do so for Adam.

¶14 Contrary to Father's assertion, the juvenile court considered all the evidence presented but found it supported severance under A.R.S. § 8-533(B)(8)(a). The juvenile court is "in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings," *Pima*

County Dependency Action No. 93511, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987), and we look only to determine whether reasonable evidence supports the court's ruling. *Maricopa County Juvenile Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996). Section 8-533(B) was enacted "in response to the increasing number of children in foster care whose parents maintain parental rights but refuse to assume their parental responsibilities." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 337, ¶ 16, 100 P.3d 943, 948 (App. 2004) (quoting 1986 Ariz. Sess. Laws, ch. 205, §§ 1, 6). The purpose of § 8-533(B) is to "expedite the adoption of numerous children who remain in temporary foster care . . . and in so doing[,] promote a stable and long-term family environment for these children." *Id.* (quoting 1986 Ariz. Sess. Laws, ch. 205, §§ 1, 6). Adam is the type of child meant to benefit by severance under § 8-533(B). The trial court could have easily concluded that had Father been serious about parenting Adam, he would have complied with the reunification plan prior to the filing of the motion to sever the parent-child relationship. At the time of trial, Adam had been in an out-of-home placement for eighteen of his twenty months of life. On this record, reasonable evidence supports the trial court's determination that

Father "substantially neglected or willfully refused" to remedy the circumstances causing Adam's out-of-home placement.⁴

B. Best Interests

¶15 Father argues the juvenile court's determination that severance was in Adam's best interests was clearly erroneous. When terminating the parent-child relationship, a preponderance of the evidence must show that severance is in the child's best interests. *Christy C.*, 214 Ariz. at 449, ¶ 12, 153 P.3d at 1078. The juvenile court must make a "finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Evidence that the child is adoptable, that an adoption plan exists, or that the existing placement meets the child's needs is sufficient to support a finding that severance is in the

⁴ We need not address Father's argument as it relates to abandonment because proof of only one statutory ground for termination is required to support an order terminating the parent-child relationship. A.R.S. § 8-533(B) (stating termination of the parent-child relationship is proper when sufficient evidence proves "any one of the" statutory grounds for termination). For the same reason, we decline to address Father's claim that the juvenile court violated his right to due process when it severed his parental rights on the ground of abandonment because he did not have notice that he could send gifts and financial support to Adam.

child's best interests. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004).

¶16 Here, the CPS case manager testified that Adam was adoptable and needed permanency and stability in his life. In addition, the case manager believed Father had not made any behavioral changes to meet Adam's basic needs. Accordingly, reasonable evidence supports the juvenile court's best interests finding.

C. Ninety-Day Extension

¶17 While testifying at the severance hearing, Father asked the juvenile court for a ninety-day extension so that he could complete the requirements for reunification. Father's counsel made the same request again during closing argument. To the extent the request was properly presented to the juvenile court, we deem it denied because the court issued an order severing the parent-child relationship without commenting on the extension request. *See State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993) (stating a motion is treated as denied when the court fails to rule on it). Father argues the juvenile court abused its discretion by denying this request. We disagree.

¶18 Father first learned of the requirements necessary for reunification at the June 2008 meeting with

the CPS case manager. When paternity was established in September 2008, Father had eight months to complete the required services before ADES filed the motion to sever the parent-child relationship. Even after the filing of the motion to sever, Father still had over four months to complete the services prior to the first severance hearing. On this record, Father had ample time to comply with the requirements necessary for reunification but failed to do so. Accordingly, the juvenile court did not abuse its discretion by denying Father's request for an extension of time. See *Findlay v. Lewis*, 172 Ariz. 343, 346, 837 P.2d 145, 148 (1992) ("A trial court has broad discretion over the management of its docket.").⁵

2. Mother's Parental Rights

A. Abandonment

¶19 Mother contends severance pursuant to A.R.S. § 8-533(1) was improper because reasonable evidence does not support the juvenile court's finding that she abandoned her child. We disagree.

¶20 Our legislature defines "abandonment" as:

⁵ Father's request for a ninety-day extension to complete reunification services as an alternate appellate remedy is denied as it is an unauthorized request to reverse the trial court on a matter committed to that court's discretion.

[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) (2007). "What constitutes reasonable support, regular contact, and normal supervision varies from case to case." *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 96, 876 P.2d 1121, 1131 (1994).

¶21 There was evidence Mother had a home, contributed to the monthly rent, and used food stamps to buy Adam food prior to CPS taking custody of him in June 2008. Mother, however, admitted that she had not seen Adam since June 2008. Even though Mother was incarcerated in March 2009 and in ICE custody by May 2009, she failed to visit Adam in the nine months prior to March 2009. Mother testified that she "kn[ew] how to get ahold [sic] of [the CPS case manager]" but "[n]ever call[ed] [] to request visits to see [Adam]." Despite Mother's testimony that she cleaned houses to support Adam and drew pictures for him, Mother admitted she "did [not] provide any type of support for [Adam]" and had no communication with him after he was

taken into CPS custody. This record amply supports the juvenile court's finding that Mother abandoned Adam. Accordingly, we find no error.⁶

B. Reunification Services

¶22 Mother also argues the juvenile court abused its discretion in severing her parental rights because CPS failed to provide her with appropriate reunification services. However, CPS had no statutory duty to diligently provide Mother with appropriate reunification services prior to seeking termination of Mother's parental rights for abandoning Adam. A.R.S. § 8-533(B)(1), (B)(11)(b); see also *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 65, ¶¶ 11-12, 993 P.2d 462, 466 (App. 1999) ("[W]e have concluded that ADES was not required to make an attempt to reunify this family to establish the statutory ground of abandonment"). Mother makes no assertion that her constitutional rights were violated. Therefore, we do not address this issue. See *Dawson v. Withycombe*, 216 Ariz. 84, 100 n.11, ¶ 40, 163 P.3d 1034, 1050 n.11 (App. 2007).

⁶ Further, we need not address the State's additional arguments supporting severance as we have concluded that severance was appropriate on abandonment grounds under § 8-533(B)(1).

C. Ineffective Assistance of Counsel

¶23 Mother maintains the termination order should be reversed because she received ineffective assistance of counsel during the severance hearing. Arizona courts have not clearly determined whether a claim of ineffective assistance of counsel can reverse a termination order. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 322-24, ¶¶ 8-12, 173 P.3d 1021, 1023-25 (App. 2007). Assuming as we did in *John M.* that Arizona recognizes a separate claim for ineffective assistance of counsel, Mother must establish (1) "counsel's representation fell below prevailing professional norms" and (2) "a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *Id.* at 323, 325, ¶¶ 8, 17, 173 P.3d at 1024, 1026; see also *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶24 Mother contends counsel's representation fell below the prevailing professional standard because counsel failed to continue the second day of trial when ICE did not transport Mother to court. Although the second day of trial proceeded in Mother's absence, the claim cannot succeed because Mother fails to identify any prejudice caused by this conduct.

¶25 Mother also contends she has a claim for ineffective assistance of counsel because her attorney failed to admit Dr. Bluth's report into evidence. CPS progress reports indicate Mother completed a psychological evaluation on June 4, 2008, and Dr. Bluth was the assigned doctor to conduct the evaluation. According to Mother, "had her counsel admitted Dr. Bluth's report into evidence and had her testify as to the findings, specifically her diagnosis of moderate mental retardation, that the outcome of the case would have been different." We disagree. Mother fails to specifically identify how the admission of Dr. Bluth's report into evidence would have changed the outcome of the trial. To the extent Mother had "moderate mental retardation," the evidence shows that it did not prevent her from having a parent-child relationship with Adam. Prior to CPS taking custody of Adam, Mother had a home, contributed to the monthly rent, and provided Adam with food using food stamps. Even after CPS took custody of Adam, Mother earned money cleaning houses. Despite Mother's ability to do these things, she never visited nor sent financial support to Adam while he was in CPS care. Accordingly, Mother has no colorable claim for ineffective assistance of counsel because she has not established

prejudice caused by her attorney's failure to admit Dr. Bluth's report.

Conclusion

¶26 For the above-stated reasons, we affirm the juvenile court's order severing Mother's and Father's parental rights to Adam.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Presiding Judge

/s/

PHILIP HALL, Judge