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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10-14-2010  
RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STEVEN B.; APRIL B.; SOLOMON B.; ) No. 1 CA-JV 10-0066  
EZEKIEL B.; and FELICIA B.; )  
 ) DEPARTMENT E  
 )  
Appellants, ) **MEMORANDUM DECISION**  
 )  
v. ) (Not for Publication -  
 ) Ariz. R.P. Juv. Ct. 103(G);  
ARIZONA DEPARTMENT OF ECONOMIC ) ARCAP 28)  
SECURITY; BENJAMIN B.; REBEKAH- )  
ANN B.; and SHAUN B.; )  
 )  
Appellees. )

Appeal from the Superior Court in Maricopa County

Cause No. JD17019

The Honorable Dawn M. Bergin, Judge

**AFFIRMED**

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Jennifer Perkowski Mesa  
Attorney for Appellant Steven B.

Robert D. Rosanelli Phoenix  
Attorney for Appellants/Minor Children

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By Amanda L. Holguin, Assistant Attorney General  
Attorneys for Appellees

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**H A L L**, Judge

¶1 Steven B. (Father) appeals the juvenile court's order severing his parental rights to Felicia B., Ezekiel B., Solomon B., and April B. (collectively, the children).<sup>1</sup> For the reasons that follow, we affirm.

#### BACKGROUND<sup>2</sup>

¶2 Father and Juanita B. (Mother)<sup>3</sup> are the biological parents of Felicia, born October 3, 1997, Ezekiel, born October 26, 1998, Solomon, born September 30, 1999, and April, born August 20, 2000. In April 2008, Child Protective Services (CPS) received its eleventh report of physical abuse or neglect filed against Father or Mother since 1999, two of which had been substantiated for abuse. Ezekiel had a bruise on his right cheek caused by Father hitting him and Father instructed Ezekiel and Solomon to explain that the bruise was the result of a football injury. Ezekiel and Solomon were temporarily removed from Father's home. Father signed a voluntary foster care agreement stating he would not physically discipline the

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<sup>1</sup> The juvenile court also terminated Father's rights to three other children in this case, Rebekah B., Shaun B., and Benjamin B. However, they are not subject to this appeal and Father does not challenge the court's order terminating his rights to them.

<sup>2</sup> We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

<sup>3</sup> Mother's parental rights to the children have also been severed, but she is not a party to this appeal.

children and Ezekiel and Solomon were returned to Father's care in May 2008.<sup>4</sup> CPS, however, received a twelfth report in July 2008 that Solomon had a purple bruise on his right thigh approximately six inches by four inches in size from being struck with a belt by Father as well as "scattered light colored" bruises on his chest from Father's punches. CPS attempted to take Ezekiel and Solomon into custody, but Father refused to release the two boys for ninety minutes and eight police officers were called to the scene in order to peacefully remove the two boys from Father's home.

¶13 Thereafter, the Arizona Department of Economic Security (ADES) filed a dependency petition in July 2008, alleging that Father was unable to parent due to physical abuse and domestic violence. Regarding the physical abuse, "the children were observed an alarming number of times with large, purple, painful bruising and scratches from being hit with a belt and other objects." The court held a temporary custody hearing and Father testified that "[b]ased on my religious [and First Amendment] right to use a belt or a rod to discipline my children, yes, I have disciplined them with a belt when needed."

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<sup>4</sup> Mother and Father separated in 2004 and the other children were living with Mother at the time of the eleventh CPS report. Mother retained physical custody of the children at various points throughout this proceeding, but the children were ultimately removed from her home and currently reside in foster homes.

The juvenile court made the children temporary wards of the court and committed them to the legal care, custody and control of ADES.

¶4 Father was offered parent aide services, parenting classes, psychological evaluation, and counseling with anger management and domestic violence components. Father refused all services and also refused to speak with or participate in services involving a female worker.

¶5 The juvenile court held a contested dependency hearing as to Father in December 2008. Father testified that he instructed Ezekiel and Solomon to lie and not tell anybody that Father had inflicted the bruises on Ezekiel. Father further testified that although he was advised and understood that his refusal to participate in services could result in the termination of his parental rights to the children, he was "[n]ot willing to do [ADES] State-funded services to get [his] children back." Father also stated that he had not sent his children any letters, cards or gifts since they had been put in out-of-home placements. The court found that Father

has physically abused his children on multiple occasions. He hit his son Solomon with a belt on his right thigh, leaving a large bruise. The police were called and found additional bruises on Solomon's chest. [Father] punched his son Ezekiel, causing a dark bruise on his face. [Father] continually referred to the blow to Ezekiel's face as an "accident" because he intended to hit the child in the chest, not the face. This logic is fundamentally

flawed and quite troubling. [Father] intentionally hit Ezekiel with the amount of force required to cause the large and painful facial bruise. That he meant to land the blow on the child's chest instead of his face is completely immaterial, and [Father's] continued assertion that the blow was an "accident" demonstrates his inability to recognize what constitutes physical abuse and his intentional endangerment of the children. Further, a bruise from a blow on the chest would not be visible, whereas one on the face would be. The Court is therefore concerned that [Father] may intentionally hit his children in places where marks or bruises would not be visible. He also admitted that he told his sons to say that the bruise were football injuries. [Father] made clear that he believes he has a fundamental right to physically discipline his children, including with belts.

The court concluded that ADES had proven by a preponderance of the evidence that the children's home was unfit by reason of abuse, neglect, cruelty or depravity by Father and that the children were dependent as to Father.

¶6 When Ezekiel and Solomon were first removed from their Father's home in July 2008, they "exhibited very troubling behaviors in their foster home. Solomon was touching and showing his privates to [his sister] and Ezekiel was caught humping [his sister] in the pool with their bathing suits on." "Ezekiel and Solomon grabbed the bottom of the foster mother's 12-year-old daughter. . . . Ezekiel was caught stealing money from the foster mother. [Ezekiel and Solomon] were defiant and refused to follow the rules in the home." However, the Administration for Children, Youth and Families (ACYF) determined that Ezekiel "has been behaving better now," is

attending school regularly, doing well in school, receiving counseling, and medication monitoring.<sup>5</sup> Solomon is also "getting better daily at his foster home," receiving medication monitoring<sup>6</sup>, counseling, attending school regularly, and doing well in school.

¶7 Letty Tan Fermo, M.D., examined April in December 2008 and determined that when April had first been removed from her home, "she was noted to be defiant, argumentative, and frustrated. She is requiring a lot of supervision . . . [s]he lies and take[s] things that do not belong to her." However, Dr. Fermo determined that her time away from Father and Mother has led April to "slowing improv[e]" and respond[] to limits and structure." April is not taking any medications, but does receive counseling. Dr. Fermo also examined Felicia and determined that although Felicia was initially easily distracted, unable to focus, disruptive, "defiant and oppositional, she has responded to structure and limits. Socially she has done well and is improving" and her mood is

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<sup>5</sup> Ezekiel was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), not otherwise specified (NOS), Mood Disorder, NOS, and Oppositional Defiant Disorder.

<sup>6</sup> Solomon was diagnosed with ADHD, combined type, and Disruptive Behavior Disorder, NOS.

"relatively stable." Felicia also receives medication monitoring<sup>7</sup> and counseling.

¶18 ACYF issued its progress report to the juvenile court in January 2009, which included some of the aforementioned information on the children, and concluded that "[t]he children have been placed in a safe, age appropriate, least restrictive foster homes. The children are being cared for, and their medical and education needs are being met."

¶19 Father eventually agreed to supervised visitations with his children and the first visit took place in February 2009, approximately seven months after the children's removal from their home. ACYF reported that Father's visitation with the children required an intervention in April 2009

due to him advising the children they did not need medication and they did not have to take it and attempted to show them a video as to why children do not need medication. Due to [Father's] lack of cooperation and advising the children of information that could be harmful to them it is recommended that the case plan be changed on [Father] to severance.

ACYF also disclosed to the juvenile court that Father "has been inappropriate during his visit [with the children] and has gone against court orders." Specifically, Father instructed April and Felicia to write letters to the court that "they want a future with their dad" and told April she does not need to take

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<sup>7</sup> Felicia has been diagnosed with ADHD, predominantly inattentive type.

her medications. He also snuck copies of a court document into April's and Felicia's bags and gave them his business card with a direct phone number, despite the fact that Father was not allowed to have unsupervised phone contact with the children. Father also asked Felicia about the current case and when he was informed by a CPS case aide that he was not allowed to discuss the case during visitation, Father "got upset, saying he does not agree and he should be able to speak with his children about 'reality.' Father continued to bring up topics against visitation guidelines, and was redirected by the case aide." Therefore, CPS temporarily discontinued visitations between Father and the children due to his "inappropriate behavior and unwillingness to follow the [visitation] guidelines."

¶10 The Foster Care Review Board issued findings and recommendations for the court and "respectfully request[ed] that the Court consider terminating [Father's] parental rights, if Father does not participate in the required services or make the behavioral changes necessary to appropriately parent the children."

¶11 On July 22, 2009, ADES filed a motion for termination of the parent-child relationship between Father and the children. The motion was subsequently amended and alleged that Father had abandoned the children, Arizona Revised Statutes (A.R.S.) section 8-533(B)(1) (Supp. 2009), willfully abused or



failed to protect the children, A.R.S. § 8-533(B)(2), substantially neglected or willfully refused to remedy the circumstances that caused the children to remain in an out-of-home placement for nine months or longer, A.R.S. § 8-533(B)(8)(a), and had been unable to remedy the circumstances that caused Ezekiel and Solomon to remain in an out-of-home placement for fifteen months or longer, A.R.S. § 8-533(B)(c).

¶12 The juvenile court conducted a contested severance hearing over several days in October 2009, December 2009, and January 2010. Father testified that he "believe[s] as a parent that a parent has the right to physically discipline their children if necessary" and that he has "expanded" his viewpoint "to say that physical discipline is a last case scenario, that it's not something that is planned, but something that if necessary can be applied." Father testified that he only physically disciplines his male children, not female children. Father acknowledged signing a foster care agreement in April 2008, in which he agreed not to physically discipline the children, but argued at the hearing that he signed the agreement under "duress" and therefore had the right to violate it. Father admitted that he refused to participate in any type of service offered by CPS, including, but not limited to counseling, including anger management and domestic violence counseling. Finally, Father testified that he would not provide

his children with medications, even if it were a directive of CPS or the juvenile court.

¶13 CPS Specialist Rebecca Kluge testified that despite being offered parent aide services, counseling, family preservation, family builders, anger management, visitation, and housing subsidy, Father refused to participate in any services except visitation, and referred to counseling and parent aide services as "pseudoscience" and "opinionative." Kluge further stated that a bonding assessment between the children and Father would not have been helpful because "a lot of kids who are in very violent homes, they're really loyal to their parents." Additionally, Kluge stated that once the children started visitations with Father, their behavior became increasingly worse. Specifically, Ezekiel became "very disrespectful, in particular to women. . . . [H]e was very aggressive, didn't want to listen to anyone" and because Father instructed the children not to take their medications, Solomon began exhibiting negative behavior. Further, Father had improperly told Felicia and April they were going to return home by June 12, 2009 and when that failed to happen, "the girls were very upset. They were aggressive, more aggressive than usual" and April even expressed that she wanted to kill herself. Finally, Kluge said that she has personally observed Father's failure to follow court orders "on a number of occasions," his resistance to the children

taking medications, and his refusal to work with a female parent aide or case manager.

¶14 Carol Chase, a Jewish Family & Children's Services clinician, testified that after Solomon started having visitations with Father, he stopped taking his medications. Chase stated that Solomon feels responsible for being in CPS care and Solomon explained to Chase that he was "never going to say anything bad about [Father] ever again." She also testified that she would be concerned if the children failed to take their medications because it could result in mood swings, manic states of mind, elevated thoughts, and thoughts that the rules do not apply to them.

¶15 Annette Morrison, Jewish Family & Children's Services therapist to Felicia and April, concurred about the benefits of taking medications, as evidenced by the fact that Felicia's medication for ADHD helped her both in school and to feel less agitated and restless.

¶16 Mother testified at the hearing that Father was "physically, verbally, emotionally abusive towards" her. She also stated that Father physically disciplined the children the same, regardless of whether they were male or female and he used belts to hit all the children. Mother gave an example of Father hitting Felicia in the face with a belt buckle in 2004.

¶17 The parties agreed to allow the children's counsel and the guardian ad litem to question Solomon, Ezekiel, and Felicia outside the presence of counsel for CPS, ADES, Father and Father's advisory counsel.<sup>8</sup> The three children each testified that they would like to live with Father and did not want Father's parental rights terminated.

¶18 The juvenile court issued an extensive ruling and found that clear and convincing evidence demonstrated that the following four grounds existed for terminating Father's parental rights to the children: (1) the children were in an out-of-home placement for a total of nine months or longer; Father substantially neglected or willfully refused to remedy the circumstances that caused the children to be in an out-of-home placement; and ADES made diligent efforts to provide the appropriate reunification services to Father, A.R.S. § 8-533(B)(8)(a); (2) Father willfully abused his children, A.R.S. § 8-533(B)(2); (3) Father abandoned the children and "[f]ail[ed] to maintain a normal parental relationship with the child[ren] without just cause for a period of six months," A.R.S. §§ 8-533(B)(1), -531(1); and (4) Ezekiel and Solomon were in an out-

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<sup>8</sup> Father represented himself throughout the termination hearing. However, an attorney was appointed by the court to serve as advisory counsel.

of-home placement for fifteen months or longer;<sup>9</sup> Father was unable to remedy the circumstances that caused the out-of-home placement; there was a substantial likelihood that Father would not be capable of exercising proper and effective parental care and control; and ADES made diligent efforts to provide the appropriate reunification services to Father, A.R.S. § 8-533(B)(8)(c).

¶19 The court also found by a preponderance of the evidence that terminating Father's parental rights was in the best interest of the children. The court noted it "does not take lightly the desire of the older children to have [Father's] parental rights maintained. However, it is clear that [F]ather has emotionally manipulated these children and they would be at risk for serious physical and emotional injury from [F]ather if his rights are not terminated." The juvenile court therefore severed Father's parental rights to the children.

¶20 Father timely appeals and argues the State: (1) violated his right and the children's right to freedom of religion by having the children participate in psychological and psychiatric interventions, (2) did not make diligent efforts to reunite Father with the children, and (3) failed to prove that severance is in the best interest of the children. The children

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<sup>9</sup> The juvenile court did not consider any time the children spent in Mother's physical custody to be an out-of-home placement.

also timely appeal and present the sole issue of whether the court erred in finding that terminating Father's rights was in their best interest. We will first address the two issues that Father solely presented in his brief and then address the remaining issue that both Father and the children presented in their respective briefs.<sup>10</sup>

#### DISCUSSION

¶21 The juvenile court may terminate the parent-child relationship only upon finding that clear and convincing evidence demonstrates at least one statutory ground for severance and that a preponderance of the evidence shows severance is in the child's best interest. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). We will affirm the judgment unless the juvenile court abused its discretion by making "factual findings [that] are clearly erroneous[;] that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998) (citations omitted). "[T]he juvenile court will be deemed to have made every finding necessary to support the judgment." *Maricopa County Juv. Action No. JS-8287*, 171 Ariz. 104, 111, 828 P.2d 1245, 1252 (App. 1991) (citations omitted).

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<sup>10</sup> Because neither Father nor the children argue that the grounds the court found for terminating Father's parental rights were in incorrect, we will not discuss those grounds.

¶122 Father first argues that the State violated his First Amendment right to religious freedom by having the children participate in psychological and psychiatric interventions. The State responds that because Father did not include this issue in his notice of appeal, this court lacks jurisdiction to consider the issue. We disagree with the State, because when reviewing an appeal from a final judgment, we have jurisdiction to hear intermediate or interlocutory orders "involving the merits of the action and necessarily affecting the judgment."<sup>11</sup> A.R.S. § 12-2102(A) (2003); *Dowling v. Stapley*, 221 Ariz. 251, 263 n.12, ¶ 36, 211 P.3d 1235, 1247 n.12 (App. 2009). We do, however, agree with the State that because Father's parental rights were ultimately terminated and because we are affirming that ruling, Father no longer has any parental rights or right to contribute to the decisions made regarding the children's upbringing. See A.R.S. § 8-539 (2007); *Diana H. v. Rubin*, 217 Ariz. 131, 138 n.6, ¶ 32, 171 P.3d 200, 207 n.6 (App. 2007).

¶123 Next, Father contends that the State failed to make diligent efforts to reunite Father with the children. The State replies that because the court terminated Father's parental rights due to abuse and abandonment, and these two grounds do not require the court to make a finding that ADES made diligent efforts to reunite Father and the children, this argument is

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<sup>11</sup> Father presented this issue to the trial court.

moot. Although abuse and abandonment may not explicitly require the court to find that ADES made diligent efforts, the court also terminated Father's parental rights due to an out-of-home placement of nine months and fifteen months as to Solomon and Ezekiel, which do require a finding of diligent efforts. See A.R.S. §§ 8-533(B)(2), (1), -533(B)(8)(a), (c). We will therefore address this issue. Despite Father's contentions, the record demonstrates that ADES made ample attempts to provide Father with appropriate services. Father was offered parent-aide services, parenting classes, visitation, housing subsidy, family preservation, family builders, a psychological evaluation, and counseling with anger management and domestic violence components. Father, however, initially refused all services. He eventually agreed to participate in visitations with the children seven months after they were put in an out-of-home placement. We therefore hold that ADES made diligent efforts to provide the appropriate services, but Father failed to comply by participating in these services.

¶24 Finally, Father and the children both maintain that it was not in the children's best interest to terminate Father's parental rights. In support of this ruling, the court found that benefits to the children include freeing them from an abusive parent as well as permitting them to be adopted.



¶125 In considering the children's best interest, the juvenile court was required to determine how the children would benefit from the severance or be harmed by the continuation of their relationship with the parents. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Freeing a child from an abusive parent is an affirmative benefit. *Id.* at 6, 804 P.2d at 735. Further, a specific adoption plan is not a prerequisite to a finding regarding the children's best interest. *Pima County Juv. Severance Action No. S-2462*, 162 Ariz. 536, 539, 785 P.2d 56, 59 (App. 1989).

¶126 Rebekah Kluge and Carol Chase both testified that the children's behavior became increasingly worse and more aggressive after they began visitations with Father. Specifically, Solomon began refusing to take his medications based on Father's directive and April threatened suicide after Father lied to her about returning home. Chase also stated she would be concerned if the children failed to take their medications because it could result in negative behavior and thoughts. However, Father explicitly testified that he would not give the children medication if they were returned to his care, even if the court or CPS mandated it. Further, ACYF issued a report stating that Solomon's and Ezekiel's behavior significantly improved since being in foster care, receiving counseling, and taking medications. ACYF concluded that "[t]he

children have been placed in a safe, age appropriate, least restrictive foster homes. The children are being cared for, and their medical and education needs are being met." Dr. Fermo also concluded that April and Felicia have both responded positively to the structure and limits provided in their foster home and through counseling and are improving socially. The record supports these opinions.

¶27 Father has repeatedly demonstrated violent and abusive tendencies towards the children. Father has further intentionally failed to participate in and comply with the recommended ADES services. Finally, the children are residing and prospering in their respective foster homes. Thus, although the children expressed both the desire to live with Father and not have his parental rights terminated, we cannot say the juvenile court erred by finding that termination of his rights was in the children's best interest.

**CONCLUSION**

¶128 For the foregoing reasons, we affirm the judgment terminating Father's parental rights to the children.

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
SHELDON H. WEISBERG, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Judge