DIVISION ONE
FILED: 11-02-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT V.,	)	1 CA-JV 10-0097
	)	
Appellant,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
GABRIELA N., MICHAEL V.,	)	Ariz. R.P. Juv. Ct. 103(G);
	)	ARCAP 28)
Appellees.	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400JS20090356

The Honorable John N. Nelson, Judge

AFFIRMED

Law Offices of Kelly A. Smith — Yuma
By Kelly A. Smith
Attorneys for Appellant

Metcalf & Metcalf, PC — Yuma
By Janet H. Metcalf
Attorneys for Appellee Gabriela N.

N O R R I S, Judge

¶1 Robert V. ("Father") timely appeals the juvenile court's order terminating his parental relationship with his son, Michael V. ("Son"). On appeal, Father argues we should vacate the termination order because: (1) Gabriela N. ("Mother")

failed to present clear and convincing evidence showing Father had intentionally abandoned Son, (2) the juvenile court failed to make the necessary factual findings to determine termination was in Son's best interests, and (3) Father's court-appointed counsel was ineffective. Because the record fails to substantiate Father's arguments, we affirm the court's termination order.

FACTS AND PROCEDURAL BACKGROUND

¶2 Son was born to Mother and Father on November 27, 2000. On January 8, 2003, the superior court dissolved Mother and Father's marriage, awarded Mother primary custody of Son, and granted Father visitation rights. For the next seven years, Father saw Son infrequently -- once or twice a week for two months after the divorce, less frequently for the remainder of 2003, and for the last time in November 2005 for only a few hours at Son's fifth birthday party.

¶3 In 2009, after becoming current on his child support payments, Father moved to modify parenting time. Mother opposed Father's petition and simultaneously moved to sever Father's rights. At trial, both Father and Mother testified along with several other witnesses. Mother introduced into evidence a social study report prepared by Nancy Friends, a court-appointed licensed professional counselor. After trial, the juvenile court terminated Father's parental rights, finding by clear and

convincing evidence Father had abandoned Son, a statutory ground for terminating parental rights under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2009). The court also found by a preponderance of the evidence that terminating Father's parental rights was in Son's best interests.

DISCUSSION

I. Sufficiency of the Evidence: Abandonment and Best Interests

¶4 The juvenile court may terminate parental rights upon finding clear and convincing evidence demonstrating a statutory ground for termination and a preponderance of the evidence demonstrating termination is in the child's best interests. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 377, ¶ 15, 231 P.3d 377, 381 (App. 2010); *see* A.R.S. § 8-533(B).

A. Abandonment Pursuant to A.R.S. § 8-533(B)(1)

¶5 Father contends Mother failed to present clear and convincing evidence Father had intentionally abandoned Son. We disagree.

¶6 Under A.R.S. § 8-533(B)(1), the juvenile court may terminate the parent-child relationship if the parent abandoned the child. As an initial matter, under A.R.S. § 8-531(1) (2007), the statutory ground of abandonment no longer requires the *intent* to abandon.[1] Rather, abandonment is measured by a

[1]Under A.R.S. § 8-531(1), abandonment is defined as:

parent's conduct. *Michael J. v. Ariz. Dep't of Econ. Sec.,* 196 Ariz. 246, 249, ¶ 18, 995 P.2d 682, 685 (2000).

¶7 Here, the record amply supports the juvenile court's finding that Father, through his conduct, abandoned Son.[2] The juvenile court found Father last saw Son briefly at Son's birthday party in 2005, and before that only when Son was three years old. Father thus had not seen Son since November 2005, nor made any effort to contact Son between 2005 and 2009 -- well over the six months required for a prima facie abandonment case. Although Father argues Mother conditioned his right to see Son on Father becoming current on all child support, the juvenile court rejected this argument finding more credible Mother's testimony to the contrary. The juvenile court, not this court, "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed

> [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.

[2]We will not disturb the juvenile court's decision to terminate parental rights unless the court abused its discretion or its findings were clearly erroneous. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004) (quoting *Maricopa Cnty. Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996)).

facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004). Thus, on this record, the juvenile court did not abuse its discretion in determining Father abandoned Son.

B. Best Interests Pursuant to A.R.S. § 8-533(B)

¶8 Father further contends the juvenile court failed to make the necessary factual findings to conclude termination was in Son's best interests. He argues the court was not in the position to determine termination was in Son's best interests because it did not make specific factual findings as to how Son would benefit from the termination or be harmed by the continuation of Father's rights.[3] We disagree.

¶9 In addition to finding a statutory ground for termination, the juvenile court must determine by a preponderance of the evidence that terminating the parent-child relationship is in the child's best interests. *See* A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). When determining whether termination is in the child's best interests, the court need not use specific "benefit" or "harm" language, but need only identify facts to support its conclusion. *See In re Appeal in Maricopa Cnty. Juv.*

[3]Father does not challenge, however, the factual bases for the court's findings.

Action No. JS-500274, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-735 (1990).

¶10 In its preliminary findings and final order, the court explained in detail its bases for concluding Son would benefit from the termination.[4] "Whether [termination] is in the child's best interests is a question of fact for the juvenile court to determine." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). We will accept the juvenile court's factual findings "unless no reasonable evidence supports those findings." *Id*. at 280, ¶ 4, 53 P.3d at 205. Thus, the juvenile court made the necessary findings required to conclude terminating Father's parental rights was in Son's best interests.

II. Ineffective Assistance of Counsel

¶11 Father also argues we should vacate the termination order because his court-appointed counsel was ineffective. We assume, without deciding, the law permits relief for ineffective assistance of counsel in termination proceedings and review Father's claim under the standard of *Strickland v. Washington*,

[4]Son currently lives in a stable home with Mother and his stepfather, who wants to adopt Son, and Son wants to take his stepfather's last name. Courts have found the immediate availability of an adoptive home or existing placement meeting the child's needs may support a best interests finding. *See Mary Lou C.*, 207 Ariz. at 50, ¶ 19, 83 P.3d at 50. Further, Son and Father do not share a bond due to the length of Father's absence, and Son has not asked about Father since November 2005.

466 U.S. 668 (1984). Therefore, we reject Father's initial argument, requesting we adopt a different standard: that ineffective assistance of counsel occurs when a parent has been denied an adequate opportunity to be heard in a meaningful manner as the result of counsel's conduct. In *John M. v. Arizona Department of Economic Security*, this court rejected that standard in favor of the *Strickland* standard. 217 Ariz. 320, 325, ¶ 18, 173 P.3d 1021, 1026 (App. 2007). We agree with the court in *John M.* and apply the *Strickland* standard.

¶12 To prevail on his claim of ineffective assistance of counsel, Father must show both: (1) counsel's actions were professionally unreasonable and (2) such actions prejudiced him. *Strickland*, 466 U.S. at 688, 691-92. We will not reverse the juvenile court's termination order "unless, at a minimum, [Father] can demonstrate that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *John M.*, 217 Ariz. at 325, ¶ 18, 173 P.3d at 1026 (citation omitted).

¶13 We reject Father's ineffective assistance of counsel claim as not colorable. Father fails to specify how calling Nancy Friends to testify would have amplified the conclusions in her report. Moreover, even assuming additional family members

could testify about Father's lack of intent to abandon Son and his belief regarding child support, Father fails to specify in detail precisely what they would have said. Further, whether Father intended to abandon Son is irrelevant, as discussed above. Finally, Father suggests he would have provided additional explanation as to why he did not maintain contact with Son, his statement to Mother's mother that he would win Son's love when Son grows up, and his unwillingness to participate in CPR classes. He had an adequate opportunity at trial, however, to provide these explanations[5] and, again, he fails to identify how these additional explanations (which he does not detail) would have changed the result. Thus, we fail to see how any of Father's attorney's actions prejudiced him. *See id.* In the absence of prejudice, Father has failed to establish his ineffective assistance of counsel claim.

[5]In response to questions about why he did not continue his attempts to see Son, Father only replied he believed Mother conditioned contact on the payment of child support -- testimony the juvenile court rejected.

CONCLUSION

¶14 For the foregoing reasons, we affirm the juvenile court's termination order.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge