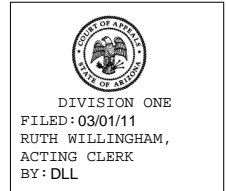


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



RUDY O.,) No. 1 CA-JV 10-0120
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, RICHARD O., SHAUGHN O.,) Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD17957

The Honorable Christopher A. Coury, Judge

AFFIRMED

Sandra L. Massetto
Attorney for Appellant

Phoenix

Thomas C. Horne, Attorney General
By Jamie R. Heller, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Phoenix

S W A N N, Judge

¶1 Rudy O. ("Father") appeals the termination of his parental rights to two of his sons ("R." and "S.", collectively the "Children"), arguing there was insufficient evidence to

support the trial court's decision. Because we find sufficient evidence, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Father is the biological father of the Children. R. was born in December 2007, and Child Protective Services ("CPS") learned shortly thereafter that the Children's mother ("Mother") had tested positive for methamphetamine at the birth. S. was born in January 2009, and CPS learned shortly thereafter that Mother had tested positive for methamphetamine at his birth. In response, CPS held a Team Decision Making meeting ("TDM") later that month to discuss Mother's substance abuse and the Children's safety.

¶3 Both Father and Mother attended the January 2009 TDM. CPS offered services to Father and asked him to stay in touch with CPS. Father did not participate in any services and did not contact CPS until shortly before CPS informed the juvenile court it was seeking termination of his parental rights.

¶4 From January 2008 to April 2009, Mother and the Children lived with Mother's parents. Father knew of his sons' births and where they lived. But Father did not live with the Children and only visited sporadically, bringing "diapers and stuff."

¹ "We view the facts in a light most favorable to affirming the trial court's findings." *In re Maricopa Cnty. Juvenile Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994).

¶15 In April 2009, because Mother had recently used methamphetamine and Mother's parents could not care for the Children, CPS removed the Children from Mother's parents' home. Next, the Arizona Department of Economic Security ("ADES") filed a dependency petition, alleging the Children were dependent under A.R.S. § 8-201(13) because there was no parent able or willing to care for them. ADES alleged Father had not established paternity of the Children and was unable to parent them due to substance abuse, neglect and domestic violence.

¶16 Father learned the Children were in CPS' care but did not immediately contact CPS. His next involvement was at the initial dependency hearing on June 26, 2009. The court ordered mediation on the issue of the children's dependency as to Father, and ordered that Father be offered relevant services.

¶17 At the mediation on July 23, 2009, the parties agreed to a case plan of family reunification and supervised visitation for Father. Father agreed to participate in parent-aide services, substance-abuse assessment and treatment, random urinalysis tests, and a paternity test. ADES arranged a meeting for a few days later to schedule those services, but Father did not appear. Father contacted the case manager for the first time on August 11, 2009, but the case manager's subsequent efforts to establish communications were unsuccessful.

¶18 Father showed no interest in visiting the Children until the case manager initiated a discussion at a September 30, 2009 TDM. Father testified that his delay in contacting the children flowed from his belief that he had to start his substance-abuse program first, and he had continued using drugs until September 2009. Additionally, Father testified he had told CPS "I wouldn't do anything for [the Children] until it was established they were my children." But even though ADES had offered paternity testing to Father in July 2009, he did not avail himself of that offer until September 2009.

¶19 On October 7, 2009, the juvenile court granted ADES' September 2, 2009 request to change the case plan to severance and adoption. On October 29, 2009, a licensed psychologist conducted a bonding assessment at ADES' request and concluded it was in the Children's best interest to remain with their foster parents. In a subsequent March 11, 2010 bonding assessment, the psychologist concluded that the Children's relationship with Father was as a temporary caregiver, not a parent.

¶10 At trial, Father admitted to a long history of drug use. He also admitted he had been in drug treatment twice before, but that he had returned to using drugs both times. Father's testimony about his participation in the latest drug treatment program, provided through ADES, demonstrated a failure to grasp key concepts of the treatment.

¶11 The trial court found that between January and April 2009, Father had made "minimal attempts to parent, and only a few attempts to visit" the Children. The trial court also found that Father had no visits at all with the Children between April and September 2009, and continued to provide only token support. The court held that the excuses Father offered were "not . . . credible or legally adequate." The court therefore concluded that Father had abandoned the Children "for at least 7 months, if not longer." The court then found that termination of Father's parental rights would be in the best interest of the Children, citing Father's "cavalier attitude toward parenting," his failure to take "critical steps" towards becoming drug-free, and his "demonstrating [a] pattern of doing whatever he wants, whenever he wants. Paramount for Father are his own interests - not the best interests of others, and certainly not the best interests of the Children."

DISCUSSION

¶12 To justify termination of the parent-child relationship, the trial court must find clear and convincing evidence of at least one of the statutory grounds set out in A.R.S. § 8-533. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court must also find by a preponderance of the evidence that severance is in the best interest of the child. A.R.S. § 8-533(B); *Kent K.*

v. Bobby M., 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005). Appellant argues there is insufficient evidence that Father had abandoned the Children per A.R.S. § 8-533(B)(1), or that termination of Father's parental rights is in the best interest of the Children.

¶13 We will affirm the termination decision of the trial court unless it is clearly erroneous, *JS-8490*, 179 Ariz. at 107, 876 P.2d at 1142, that is, unless no one could reasonably find that the evidence, viewed in the light most favorable to sustaining the verdict, met the applicable standard of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 95, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

I. THE FINDING OF ABANDONMENT WAS NOT CLEARLY ERRONEOUS.

¶14 A statutory basis for terminating parental rights exists if a parent abandons a child, A.R.S. § 8-533(B)(1), by failing "to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." A.R.S. § 8-531(1). Such a failure "without just cause for a period of six months constitutes prima facie evidence of abandonment." A.R.S. § 8-531(1). "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct" *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. When "circumstances prevent the father . . . from exercising traditional methods of bonding with his child, he

must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary." *Id.* at 250, ¶ 22, 995 P.2d at 686. "If a man has reasonable grounds to know that he might have fathered a child, he must protect his parental rights by investigating the possibility and acting appropriately on the information he uncovers." *JS-8490*, 179 Ariz. at 106, 876 P.2d at 1141. "The law does not permit [a father] to sit back and wait until receipt of formal notice of fatherhood." *Id.* at 107, 876 P.2d at 1142.

¶15 Here there is sufficient evidence that Father did not act persistently and vigorously assert his legal rights as a parent. The testimony shows father had only sporadic contact with the Children and provided them essentially no support. Father admitted "he wouldn't do anything" for the Children until paternity was proven, which did not occur until nearly 9 months after the second child was born. As the trial court properly held, unproven paternity does not excuse abandonment. *JS-8490*, 179 Ariz. at 106, 876 P.2d at 1141. And Father's belief that CPS would not allow visitation unless he participated in the agreed-upon drug treatment programs, even if true, is also no excuse. *See Michael J.*, 196 Ariz. at 250, ¶¶ 21-22, 995 P.2d at 686 (holding that even incarceration does not excuse a parent's

"failure to make more than minimal efforts to support and communicate with his child").

II. THE FINDING THAT TERMINATION WAS IN THE BEST INTEREST OF THE CHILDREN WAS NOT CLEARLY ERRONEOUS.

¶16 "[T]he best interests inquiry requires a delicate balancing of the child's interests, along with the *parens patriae* interest of the state, against the interests of an unfit parent . . . [and] the preponderance of the evidence standard adequately allocates the risk of error between these competing interests." *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022. "[A] determination of the [children's] best interest must include a finding as to how the [children] would benefit from a severance or be harmed by the continuation of the relationship." *In re Appeal in Maricopa Cnty. Juvenile Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). We will affirm the finding of the juvenile court unless it is clearly erroneous. *JS-8490*, 179 Ariz. at 107, 876 P.2d at 1142.

¶17 Here the record supports the juvenile court's finding that continuing Father's parental rights would be detrimental to the Children. Father testified he had twice before returned to using drugs after participating in substance-abuse treatment programs, and there is evidence that indicates that he did not sincerely participate in the third, most-recent program.

¶18 Father "proudly" claimed to be the father of the children when they were born, but testified he felt no obligation to them "[u]ntil the time I found out they were unequivocally . . . my children," and then waited months -- until the severance proceedings were about to be initiated -- to take advantage of the paternity testing services that ADES offered. Father did not take advantage of any of the services that ADES offered until he faced the possibility of judicial severance of his parental rights.

¶19 His testimony regarding employment was meager and evasive, and while he managed to support his methamphetamine addiction "everyday," he provided only sporadic token support for the Children. Similarly, Father had neither lived with nor supported two other children, now adults. Additionally, Father had been imprisoned three times, for a total of 14 years since he turned 21 in 1989. Finally, for the entirety of the Children's lives, up until the time ADES initiated severance proceedings, Father made no effort to have a substantial role in the Children's lives or to act as their parent. A psychologist who had assessed the Children gave expert testimony that given the parents' questionable long-term commitment to be "substance free," their lack of stable employment and the lack of a secure home, reunification with the parents was not in the best interests of the Children.

¶20 Father argues that "as a matter of law" this evidence is insufficient to support the trial court's best-interests finding, but provides no authority to support his argument. Father also argues that because their Mother's parental rights have not been terminated, the Children are not presently adoptable. This is irrelevant because while adoptability is a factor a court may consider, *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998), it is not a requirement for severance of parental rights and the trial court did not rely on it.

¶21 Father finally argues that severance would not be in the best interest of "this family." However, "the best interests inquiry focuses primarily upon the interests of the child, as distinct from those of the parent," *Kent K.*, 210 Ariz. at 287, ¶ 37, 110 P.3d at 1021, or of other children who are part of the family. See *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 12, 178 P.3d 511, 514 (App. 2008) (finding evidence relating to a sibling born during the proceedings was not relevant to the determination of the best interests of the children). In addition, there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility." *Lehr v. Robertson*, 463 U.S. 248, 259-60 (1983) (cited with approval in *In re Appeal in Pima Cnty. Juvenile Severance Action No. S-114487*, 179 Ariz. 86, 876 P.2d

1121 (1994)). “[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association” *Id.* at 261 (citation and internal quotation marks omitted). A natural father is accorded a unique opportunity to forge that attachment, *id.* at 262, but should the father not grasp that opportunity, the resulting “nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating . . . the best interests of the child.” *Id.* at 266-67. On the record before us the trial court could reasonably have concluded that Father was not part of the Children’s family in any meaningful sense.

¶122 Therefore, we cannot say the trial court erred in concluding that severing Father’s parental rights was in the Children’s best interests.

CONCLUSION

¶23 Because the trial court did not clearly err in finding that a statutory basis for severance of Father's parental rights existed and that severance would be in the best interest of the Children, we affirm.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

PHILIP HALL, Presiding Judge

/s/

SHELDON H. WEISBERG, Judge