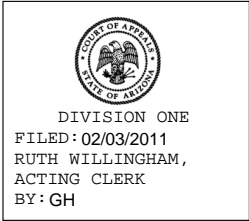


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



JES G.,) 1 CA-JV 10-0188
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, ANDY G., HEIDY G.,) Not for Publication -
WILLY G.,) (Ariz. R.P. Juv. Ct.
) 103(G); ARCAP 28)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD 17407

The Honorable Christopher A. Coury, Judge

AFFIRMED

Tom Horne, Attorney General Mesa
by Michael F. Valenzuela, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

The Law Office of Anne M. Williams
by Anne M. Williams Tempe
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Jes G. ("Father") appeals from the superior court's order severing his parental rights to his children, Willy G.,

Andy G., Emelin G., and Heidy G. For reasons that follow, we affirm.

BACKGROUND

¶2 In October 2008, the Arizona Department of Economic Security ("ADES") filed a dependency petition governing all four of Father's children. When the children were taken into care, their Mother, Dolores G., had been arrested for failing to protect Emelin from sexual abuse by Father and another man. Father also was in custody due to the allegations of sexual abuse. In addition, both parents were subject to an Immigration and Naturalization Service ("INS") hold.

¶3 An initial dependency hearing took place in November 2008, and the court found the children dependent as to both parents. The case plan was family reunification. In January 2009, the court ordered that the children be placed with their maternal uncle and his wife. At a March hearing, Father's counsel informed the court that he had been sentenced and transported to the Arizona Department of Corrections.¹

¶4 At a May 2009 report and review hearing, counsel for Mother stated that Mother was being deported to Guatemala on July 25. The children were placed on visitation status with a maternal aunt. An October 2009 Foster Care Review Board report

¹Father was convicted of one felony count of attempted molestation of a child and two felony counts of sexual abuse. The court imposed a 7.5 year term of imprisonment.

noted that if Father obtained early release from prison, it would be approximately in 2015. In November 2009, the court approved a change in the case plan to severance and adoption.

¶15 ADES filed a motion seeking termination of the parental rights of Mother and Father. The motion cited Arizona Revised Statutes ("A.R.S.") sections 8-201(2) and 8-533(B)(2) and (4) (Supp. 2010) as grounds for the severance. ADES alleged that the parents had willfully abused or failed to protect the children from abuse; that due to Mother's deportation and Father's imprisonment, the children would be deprived of a normal home for a period of years; and that the children were adoptable and were residing in a foster home committed to adopting them and thus that severance was in their best interests.

¶16 At a December 2009 hearing, both parents contested severance. On March 25, 2010, Father's counsel filed a notice that he was no longer contesting severance but believed that severance was in the children's best interests. At the scheduled trial in April, the children's guardian ad litem disclosed that Emelin had alleged physical abuse by her maternal aunt and that she did not wish to be adopted by or to live with her aunt. Father's counsel stated that in light of the allegation, he wished to contest the severance until Child

Protective Services ("CPS") could investigate. The court continued the hearing until June 29, 2010.

¶7 At the next report and review hearing on May 7, 2010, the court approved a change in custody of Emelin to a group home and a change in her case plan to independent living. It also ordered that she be dismissed from the Motion for Termination. Father's counsel moved to withdraw from representation and asked to retract Father's consent to severance. The court held his consent "in abeyance" pending appointment of new counsel.

¶8 On June 24, Father's new counsel moved to vacate the termination hearing set for June 29 because he had been unable to schedule an interpreter for a telephonic conference with Father. The court denied the motion because counsel had been appointed on May 25 and "made no showing, nor even an avowal" on whether the ordered coordination between prior and new counsel had taken place so that trial could occur as scheduled or whether counsel had attempted to meet with Father but could not find an interpreter. Furthermore, given the grounds for severance, the court added that "much of the trial will be based on documentary evidence establishing that Father is convicted of a felony . . . and evidence about the deprivation of a normal home." In addition, A.R.S. § 8-862(D) required that a trial on termination occur within ninety days of the November 13, 2009 hearing at which the court approved the case plan of severance

and adoption. Thus, even though Father was willing to waive the time limits, the court concluded that to postpone trial "would demonstrate a disregard for the [statute's] mandatory time limits." But it would "consider, on an expedited basis, any and all requests" for visits with Father before trial and would enter necessary orders. The record does not contain any requests for orders to facilitate visits.

¶9 On June 29, the court terminated Mother's parental rights. It next turned to Father's rights. Father's counsel re-urged the motion to continue but stated that he had had one conversation with Father and did not suggest that there was any matter he had been unable to discuss with Father. Counsel also reported that Father did not contest the statutory grounds but did challenge whether severance was in the children's best interests. After further inquiry by the court, the court found that Father knowingly, intelligently, and voluntarily waived his right to contest the statutory grounds, leaving only the children's best interests in dispute. The court heard testimony from the case worker, Father, and Father's mother.

¶10 At the end of trial, the court found by a preponderance that termination was in the children's best interests because they would benefit from the stability of living in a permanent home free of abuse. Even Father had conceded that ending the legal proceedings was in the children's

best interests, and termination would allow closure of "this painful chapter" in the children's lives. Additionally, the children were happy, safe, doing well, and wanted to be adopted by their maternal aunt. Finally, the children knew that Father's misconduct had caused the family's disruption and that was a detriment of continuing the parental relationship. Thus, the court ordered severance of Father's parental rights to Andy, Heidy, and Willy.

¶11 Father timely appealed. We have jurisdiction pursuant to A.R.S. § 8-235 (2007).

DISCUSSION

¶12 To sever a parent's rights, the superior court must find clear and convincing evidence of at least one of the statutory grounds listed in A.R.S. § 8-533(B). *Michael J. v. ADES*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The court also must find by a preponderance of the evidence that severance is in each child's best interest. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). On appeal, we defer to the trial court's factual findings unless we find them clearly erroneous, i.e. unsupported by reasonable evidence. *Minh T. v. ADES*, 202 Ariz. 76, 78-79, ¶ 9, 41 P.3d 614, 616-17 (App. 2001). We also view the evidence in the light most favorable to upholding the court's ruling. *Manuel M. v.*

Ariz. Dep't of Econ. Sec., 218 Ariz. 205, 207, ¶2, 181 P.3d 1126, 1128 (App. 2008).

¶13 Here, Father conceded that ADES could establish the statutory grounds by clear and convincing evidence. Accordingly, the court considered only the children's best interests.

¶14 Severance may advance a child's best interests if the child benefits from termination or would be harmed by continuing the parental relationship. *James S. v. ADES*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998). Also, as here, "[e]vidence of an existing adoption plan can be considered a benefit to the child." *Id.* See also *Audra T. v. ADES*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998) ("the immediate availability of an adoptive placement" and the fact that the children's placement is meeting their needs are facts the court may consider).

¶15 The case worker testified that the children's maternal aunt wished to adopt them and they wished to be adopted by her. Her home would provide permanence and stability, was meeting all of the children's needs, and was free of abuse. The case worker stated that the detriment of maintaining the parental relationship was because the children knew of Father's misconduct and that both parents had been arrested. The case worker added that she had been unable to verify Emelin's allegation of abuse by the aunt.

¶16 Father testified that he did not object to adoption but did object to the maternal aunt because of statements his mother reported to him that Emelin had made about the aunt. Father's mother testified that Emelin had called her to say that the aunt "was hitting the children a lot." Nevertheless, the case worker had interviewed each child individually, and none had corroborated Emelin's allegation and instead had all said that they were happy that Emelin was no longer living with them.

¶17 Father's sole contention on appeal is that denial of a continuance caused his counsel to render ineffective assistance at trial and constitutes reversible error. He argues that prior trial delays were not Father's fault and that the court penalized Father by denying a continuance.

¶18 Motions to continue are left to the trial court's sound discretion, and we will not overturn its ruling "absent a clear abuse of discretion." *Yavapai County Juv. Action No. J-9365*, 157 Ariz. 497, 499, 759 P.2d 643, 645 (App. 1988). We find no clear abuse here. Father's counsel never argued that he was unprepared for trial or explained what he expected to gain from a continuance. Counsel cross-examined the State's witnesses and called both Father and Father's mother to testify. Father does not explain how he was prejudiced by denial of the continuance: he had conceded the statutory grounds for severance and objected to placement with the maternal aunt solely due to Emelin's

allegation, which was unsubstantiated. Father fails to suggest how the trial's outcome would have been different had he obtained a continuance. If Father wished more information about Emelin's allegation, because it arose in April 2010, Father's counsel had time to investigate and forward pertinent information to Father's new counsel before the severance trial on June 29.

¶19 Therefore, the trial court did not abuse its discretion in denying the continuance. In addition, reasonable evidence supported the order terminating Father's parental rights.

CONCLUSION

¶20 For the foregoing reasons, we affirm the severance order.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
DONN KESSLER, Presiding Judge

/s/ _____
DIANE M. JOHNSEN, Judge