DIVISION ONE
FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JASON B.,	)	1 CA-JV 10-0246
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	103(G) Ariz. R.P. Juv. Ct.;
NICOLE P., LAUREN P.,	)	Rule 28 ARCAP)
	)	
Appellees.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS506619

The Honorable Terri L. Clarke, Commissioner

AFFIRMED

Vierling Law Offices — Phoenix
By Thomas A. Vierling
Attorneys for Appellant

Chism Brown Law — Phoenix
By Christy C. Brown
Attorneys for Appellee Nicole P.

N O R R I S, Judge

¶1 Jason B. ("Father") appeals termination of his parental rights to his daughter, Lauren P. He argues we should reverse the termination order because the juvenile court (1)

failed to determine whether he was served with the petition and notice of hearing, (2) failed to allow Father to appear telephonically at the termination hearing, and (3) entered the termination order without sufficient evidence supporting the statutory grounds for termination (abandonment and wilful abuse). He also argues the evidence failed to show termination was in daughter's best interests. We disagree with all of Father's arguments and affirm the court's termination order.

FACTS AND PROCEDURAL BACKGROUND

¶2 On April 27, 2010, Nicole P. ("Mother") privately petitioned the juvenile court to terminate Father's parental rights to daughter, born in December 2001, alleging abandonment and wilful abuse. After unsuccessfully attempting to serve Father with the petition and the notice of hearing at his last known address in Arizona and finding service to be impracticable, Mother moved for alternative or substituted service. The court granted Mother's motion and allowed her to serve Father by publication. Although the record does not reflect whether Father was served, he contacted the juvenile court's staff seeking information on the case at least three weeks before the initial severance hearing and appeared telephonically at that hearing ("first hearing") with his counsel personally present.

¶3 During the first hearing, Father told the court he was living in Wisconsin. The court read the Form III notice to Father and explained to Father his hearing rights. The court also specifically informed Father that if he failed to

> attend the initial termination hearing, pretrial conference, status conference or termination adjudication hearing without good cause, the Court may determine that [he has] waived [his] legal rights and admitted the allegations in the motion or petition for termination.
>
> The hearings may go forward in [his] absence and the Court may terminate [his] parental rights to [his] child based on the record and the evidence presented.

Although Father stated he was "fully competent and . . . completely . . . knowledgeable of the words" in the Form III, he refused to say that he "underst[oo]d" those rights because that word "has ramifications to it that [he does] not want to admit to." Based on its colloquy with Father, the court was unable to determine whether he understood the concepts involved in the termination of parental rights. Accordingly, the court directed Father to submit to a psychological evaluation to determine his mental competency and appointed a guardian ad litem ("GAL") for Father. Ariz. Rev. Stat. ("A.R.S.") § 8-535(F) (2007). The court also continued the hearing until October, allowing Father to appear telephonically at the next hearing.

¶4 At the continued severance hearing before a different commissioner ("second hearing"), the court vacated the prior order for the psychological evaluation based on the GAL's avowals Father understood the Form III and without objection by Father's counsel. Nevertheless, because Father previously had refused to sign the Form III and had stated he did not understand the Form III, and given the significant interests at stake in a termination case, the court continued the severance hearing for approximately 30 days and refused Father's request to appear telephonically. The court again advised Father it would "proceed in [his] absence [at the next hearing] absent any good cause being shown."

¶5 Despite the court's warning, Father failed to appear in person at the next hearing and, in light of Father's counsel's confirmation that Father was only "planning on appearing telephonically" at the termination adjudication hearing, the court advised it would proceed with that hearing immediately ("termination hearing"). The court found Father "was initially properly served and was advised of the terms and the Form IIIs were read to him," indicating the penalties for failing to appear. It found no good cause for Father's non-appearance and found Father had voluntarily absented himself from the hearing.

¶6 Based on Mother's testimony and the exhibits she introduced at the termination hearing, the court found the statutory grounds for termination based on abandonment and wilful abuse. It also found termination was in daughter's best interests. Father timely appealed. We have jurisdiction pursuant to A.R.S. § 8-235(A) (2007).

DISCUSSION

I. Service of Petition and Notice

¶7 Father first argues we should reverse the termination order because the juvenile court failed to determine whether Mother served him with the petition and the notice of hearing. Although the record does not contain any evidence showing Mother had actually served Father with the petition and the notice of hearing, Father nevertheless appeared and participated in the case. Accordingly, Father waived any objection to insufficient service of process.

¶8 Arizona Rule of Procedure for the Juvenile Court 64(D)(3) requires the petitioner in a termination proceeding to serve the petition for termination of parental rights and the notice of hearing on the interested parties listed in A.R.S. § 8-535 and in the manner described by Arizona Rules of Civil Procedure 4.1 and 4.2. At the initial termination hearing, the juvenile court is required to determine, *inter alia*, whether such service has been completed. Ariz. R.P. Juv. Ct. 65(A).

When a parent appears and participates in a termination case, the parent waives his or her objections to "insufficient service of process." *Pima Cnty., Juv. Action No. S-828*, 135 Ariz. 181, 184, 659 P.2d 1326, 1329 (App. 1982); *cf. Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) (under civil procedure rules, answering a complaint without contesting sufficiency of service of process or "general appearance by a party who has not been properly served has exactly the same effect as a proper, timely and valid service of process").

¶9 At the termination hearing, the court found Father "was initially properly served." Although nothing in the record substantiates that finding[1] and the court did not explain the basis for its finding, Father found out about the first hearing, contacted the court, and appeared and participated telephonically at the first hearing and the second hearing without contesting service. Furthermore, Father's counsel personally appeared and participated at every hearing, as did Father's GAL once the court appointed him. Accordingly, by

[1]The record does not contain an affidavit of service by publication as required by the juvenile court's order granting Mother's Motion for Alternative or Substituted Service. *See* Ariz. R. Civ. P. 4.1(n) (party serving "shall file an affidavit showing the manner and dates of the publication and mailing, and the circumstances warranting the utilization of the [alternative] procedure").

appearing and participating in the hearings, Father waived his objections to the service of process.[2]

II. Telephonic Appearance

¶10 Father next argues we should reverse the termination order because the juvenile court refused to allow him to appear telephonically at the termination hearing. We disagree.

¶11 For hearings on the termination of parental rights, "the court *may permit* telephonic testimony or argument." Ariz. R.P. Juv. Ct. 42 (emphasis added). The juvenile court thus has "the authority, but not an obligation, to allow the parents to appear by telephone rather than in person." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 234, ¶ 14, 119 P.3d 1034, 1037 (App. 2005). At the second hearing, the court denied Father's request to participate telephonically at the termination hearing (which it also postponed) because he had refused to sign the Form III and confirm he understood the Form III. After ascertaining he was not on food stamps, the court also rejected Father's argument he was unable to personally appear because he was indigent. At the termination hearing, the court again rejected counsel's request that Father be permitted to appear telephonically, expanding on what it had said at the

[2]In his reply brief, Father notes the court did not find Father was served in its written findings of fact. The court, however, did so in its unsigned minute entry and on the record at the termination hearing.

second hearing -- it needed to personally observe him given what the record reflects was obstructionist behavior. Under these circumstances, the juvenile court did not abuse its discretion.

¶12 Likewise, the juvenile court did not violate Father's due-process rights in refusing to allow him to appear telephonically. First, at both the first hearing and the second hearing, the court explained to Father the consequences if he failed to appear in person at any subsequent hearing. Second, it had rejected his requests at both the second hearing and the termination hearing to appear telephonically for justifiable reasons and consistent with its discretion.

III. Statutory Grounds for Termination

¶13 The juvenile court may terminate the parent-child relationship 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) (Supp. 2010). We view the "juvenile court's termination order in the light most favorable to sustaining the court's decision[3] and will affirm it 'unless we

[3]As the trier of fact in a termination proceeding, the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and

must say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.'" *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 95, ¶ 10, 210 P.3d 1263, 1266 (App. 2009) (quoting *Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955)).

A. Abandonment

¶14 Father contends the juvenile court misapplied the statute and the evidence was insufficient to show Father abandoned daughter based on the "unusual circumstances of this case." We disagree.

¶15 Under A.R.S. § 8-533(B)(1), the court may terminate the parent-child relationship if the parent abandoned the child, as measured by the parent's conduct. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 18, 995 P.2d 682, 685 (2000). Abandonment is defined as:

> [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.

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resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004).

A.R.S. § 8-531(1) (2007).

¶16 The juvenile court found Father had made no effort to support or communicate with daughter since 2007, and the record supports this finding. Based on daughter's disclosures to Mother that Father had abused her, Mother sought and obtained sole custody of daughter in 2006. Pursuant to court order, the court allowed Father visitation through a therapeutic intervention process that ultimately began around April 2007. In August 2007, Mother stopped paying her court-ordered share of the cost for the intervention because Father had inappropriately touched daughter during the sessions. Mother introduced into evidence minute entries from the custody case that reflected, in 2008, the court had ordered Father to submit to a psychological examination and had stated that after the examination it would consider whether to reinstate Father's parenting time. Mother testified the court had also ordered that "if [Father] wanted to continue the intervention process . . . he could pay for it, and so he stopped and it was done after that." Mother also testified that thereafter Father had no contact with daughter -- did not send letters or birthday presents to daughter (now eight years old) and did not call daughter -- and paid no child support. Thus, the record reflects that although Father could have sought visitation with daughter, he had failed to take appropriate steps to do so, and had neither contacted nor

provided financial support for daughter since 2007. Accordingly, sufficient evidence supports the court's finding Mother had proved by clear and convincing evidence Father abandoned daughter.

B. Abuse

¶17 Father next argues the court's finding Father had wilfully abused daughter was not supported by the record because the record lacks any evidence "that any action by the father resulted in 'serious physical or emotional injury.'" We disagree. Although we need not consider this ground for termination because we have affirmed the court's termination order on abandonment, here, ample evidence supports this ground as well. *See Michael J.*, 196 Ariz. at 251, ¶ 27, 995 P.2d at 687.

¶18 Under A.R.S. § 8-533(B)(2), the court may terminate the parent-child relationship if the parent has "neglected or wilfully abused a child," which "includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing" the child. Here, based on the evidence presented, including findings made in the Pediatric Progress Notes & Worksheet prepared by the pediatrician who examined daughter regarding the abuse claim ("Progress Notes") and in the Child Protective

Services ("CPS") Report, the juvenile court found it was highly probable Father had wilfully abused daughter.

¶19 At the termination hearing, Mother testified when daughter was four years old she told Mother her "tush" hurt because Father had touched it one night. Mother called 9-1-1 and then took daughter to the pediatrician for an examination and to the CPS Child Help office. The pediatrician examined and spoke with daughter and found "[p]ossible molestation highly suggestive." Consistent with Mother's testimony, in the Progress Notes, the pediatrician reported daughter had explained her tush hurt (daughter's word for her private area) and demonstrated how Father had touched her vaginal area while she was sleeping. Likewise, the CPS Report substantiated daughter's claim Father had "sexually abused" her "when he digitally penetrated her vaginal area." The uncontroverted findings of CPS and the pediatrician that Father had sexually abused daughter, combined with Mother's testimony, constitute sufficient evidence supporting the juvenile court's finding of wilful abuse under A.R.S. § 8-533(B)(2).

C. Best Interests

¶20 Father contends the evidence failed to support the juvenile court's finding it was in daughter's best interests to terminate Father's parental rights. We disagree.

¶21 To support a best-interests determination, the court "must include a finding as to how the child would benefit from a severance *or* be harmed by the continuation of the relationship." *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). In making this finding, the court may consider whether the needs of the child are being met by the existing placement. *Maricopa Cnty., Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994). Father contends the court "should also consider the degree to which the child's relationship with [F]ather can be nurtured and developed," but cites cases that use this proposition in contexts other than in a best-interests determination. *See Michael J.*, 196 Ariz. at 251-52, 995 P.2d at 687-88 (termination under A.R.S. § 8-533(B)(4) due to length of parent's felony prison sentence); *Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, 42 P.3d 1163 (App. 2002) (visitation rights while incarcerated). Here, the juvenile court found Mother had established by a preponderance of the evidence it was in daughter's best interests to terminate Father's rights because Father had not contacted daughter for "over three years" and "Mother ha[d] made sufficient arrangements to provide for [daughter] should she be unable to care for [her]." Because this determination is a question of fact for the juvenile court, we will accept these factual findings "unless no reasonable evidence supports" them.

Jesus M. v. Ariz. Dep't of Econ. Sec., 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). The record reflects daughter's needs are being met in Mother's stable custody and the court's best-interests finding is supported by reasonable evidence.

CONCLUSION

¶22 For the foregoing reasons, we affirm the juvenile court's termination order. Mother requests attorneys' fees and costs pursuant to A.R.S. § 25-324 (Supp. 2010). That statute does not apply to termination proceedings, and we thus deny Mother's request for attorneys' fees. We do, however, award Mother her costs on appeal subject to her compliance with Arizona Rule of Civil Appellate Procedure 21. A.R.S. § 12-342 (2003).

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge