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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



DIVISION ONE
FILED: 07/19/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

JEREMIAH V.,) No. 1 CA-JV 11-0010
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SUNNI L., SIERA V.,) Rule 103(G) Ariz. R. P.
) Juv. Ct.; ARCAP 28)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JS506481

The Honorable David K. Udall, Judge

AFFIRMED

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Mesa

K E S S L E R, Judge

¶1 Jeremiah V. ("Father") appeals the juvenile court's order terminating his parental relationship with his daughter,

Siera V. ("Child"), on grounds of abandonment pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2010).¹ For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶12 Child was born on June 20, 2006 in Maricopa County. Father moved to New Mexico when Sunni L. ("Mother") was two months pregnant with Child, during which time they "dat[ed] over the phone." Father was present at Child's birth and signed her birth certificate, but did not help pay for any of the related medical expenses. Through the severance trial that extended through December of 2010, Child continued to live with Mother in Maricopa County under her care and supervision. Father provided financial support (approximately \$200.00 per month) for a short period after Child's birth. Although Mother and Father separated when Child was two and a half months old, Father continued to provide "\$50 here and there."

¶13 Throughout 2007 and 2008, Father harassed Mother with late night and early morning phone calls, sometimes as many as 100 calls per night. Due to these harassing calls, Mother filed for and was granted three separate protective orders against Father. One of the orders was ultimately dismissed due to a lack of proof. There is no evidence that the protective orders

¹ We cite to the most current version of the statute when it has not been substantively revised since the date of the underlying conduct.

included Child, but regardless, Father did not make any attempt to have contact with Child through any other measures; Father did not get in touch with Mother's family members or take any legal action to see Child. From January 2007 through November 2009, Father did not send Child any gifts, letters or pictures, and did not provide her with any form of assistance or encouragement.

¶4 Child's maternal grandmother, Glenda H. ("Grandmother") testified that Father broke into Mother's truck multiple times as well as the patio of their apartment.² Grandmother also testified that Father called Child "filthy names" when she would cry as a newborn.

¶5 In April of 2009, Mother filed a private severance action to terminate Father's parental rights on grounds that Father abandoned Child. The initial hearing took place and the matter was set for mediation. Father also insisted to a paternity test at his own expense.³ Both parties subsequently notified the court that they had come to an agreement and were awaiting Mother's and Father's approval and finalization of the documents. Father did not approve the agreement until two months after they had given notice to the court, and the terms

² Mother and Grandmother shared an apartment due to Grandmother's terminal cancer.

³ Results of the paternity test confirmed that Father was the biological father of Child.

were never approved by Mother. While this case was pending, Father saw Child once, when he took her to a mall and went on a ride with her. Father has not paid any child support since January of 2007.

¶16 In February of 2010, Father was arrested and incarcerated in New Mexico. Father sent Child a drawing that he made for her during his incarceration. When Father was incarcerated, Father's attorney moved to withdraw as Father's counsel. The court granted this motion on the condition that Father's attorney forward all documents to Father and made sure Father was aware of all court dates. Father made no appearance at the severance hearing on May 7, 2010. The juvenile court severed Father's parental relationship with Child. It held that Father abandoned Child because he failed to provide reasonable support in the form of financial assistance, regular contact, normal supervision or a stable relationship with Child.

¶17 After Father was released from jail, he informed the juvenile court that he did not have notice of the May 7th hearing. At that time, Father also requested counsel and visitation with Child. The court appointed Father counsel but denied his motion for visitation. The court vacated its previous finding and ordered a new trial. The severance hearing was held on December 3, 2010.

¶18 Notwithstanding Father's testimony that he loves Child and wishes to relocate back to Arizona to be closer with her, the juvenile court again terminated Father's parental rights. The court held Father never had any regular or consistent contact with Child, had paid no child support since January of 2007, and had not provided any guidance or assistance to Child. Furthermore, it held that Child had forgotten that Father is her father and Child's maternal uncle ("Uncle") is the father figure in her life, providing regular and consistent contact. Father timely appeals. We have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1) (2003), and -2101(A),(B) (2003).

DISCUSSION

¶19 Father contends that the juvenile court erred in terminating his parental relationship with Child. Father argues that Mother failed to prove (1) that Father has abandoned Child and (2) that it would be in Child's best interest for his rights to be terminated.

¶10 "The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (citation omitted). Thus, on appeal, this court "will accept the juvenile court's findings of fact unless no

reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Id.* "However, we review *de novo* any issues of law, including the interpretation of a statute." *Kenneth B. v. Tina B.*, 226 Ariz. 33, 36, ¶ 12, 243 P.3d 636, 639 (App. 2010).

¶11 Parents have a fundamental right to raise their children as they deem fit, but that right is not without limitation. *Minh T. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 76, 79, ¶ 14, 41 P.3d 614, 617 (App. 2001). To terminate parental rights, the juvenile court must find by clear and convincing evidence the existence of at least one statutory ground provided in A.R.S. § 8-533(B). *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 termination of that relationship is in the best interest of the child. *Id.*; *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005).

I. The juvenile court did not err in finding Father abandoned Child under A.R.S. § 8-533(B)(1).

¶12 Father contends that the juvenile court erred in terminating his parental rights under A.R.S. § 8-533(B)(1). A.R.S. § 8-533(B)(1) states that a parent-child relationship may be terminated when the "parent has abandoned the child." A.R.S. § 8-531(1) defines "abandonment" 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.

¶13 The concept of abandonment is somewhat imprecise and elastic; therefore the questions of abandonment and intent are questions of fact for resolution by the juvenile court. *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990). When determining whether a parent abandoned his child, the court uses an objective standard, focusing on his actual conduct and not his intent. *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. For abandonment to exist there must be evidence of "intentional conduct on the part of a parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pima Cnty. Severance Action No. S-1607*, 147 Ariz. 237, 238, 709 P.2d 871, 872 (1985) (citation omitted). 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." *Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994).

¶14 In deciding whether a parent has abandoned a child as defined in § 8-531(1), a court should consider whether the parent has: (1) provided "reasonable support"; (2) "maintain[ed] regular contact with the child"; and (3) provided "normal supervision." A.R.S. § 8-531(1). Neglect of child support obligations is not synonymous with abandonment for purposes of termination of parental rights, but it is a factor to be considered, and when coupled with failure to communicate or send gifts, is sufficient to uphold conclusions that the child has been abandoned. *Maricopa Cnty. Juv. Action No. JS-3594*, 133 Ariz. 582, 586, 653 P.2d 39, 43 (App. 1982).

¶15 The juvenile court found that Father abandoned Child. It found that Father had paid no child support since January of 2007, that Father never had any regular or consistent visits with Child, and that Father had not provided any guidance or assistance during the course of Child's life. The only visit Father paid to Child in four years was a half an hour visit during the pendency of the severance proceeding when they went on a ride at a mall together. Father has given Child minimal gifts, which includes an Elmo doll that he gave to Child as a newborn, and subsequently saved the receipt to deduct the amount from that month's child support payment.

¶16 Father argues he wanted to visit Child but could not due to the protective orders and the denial of his request for visitation. However, assuming the protective order applied to the Child, there is no evidence Father sought relief from that order so he could be with Child. Although Father expressed a desire to have a relationship with Child, we look at his actual conduct and not his intent. Father, through his lack of support and failure to maintain regular contact and supervision over a time span of four years demonstrates a desire to forego (or an inability to perform) his parental duties. The record supports the juvenile court's finding that Father has made minimal efforts to contact Child and maintain a relationship with her. While Father was unable to exercise traditional methods of bonding with Child because he chose to live and work in New Mexico, he took no action to create a relationship with Child by calling, writing letters, sending pictures, and sending child support. Therefore, we find there is sufficient evidence to support the juvenile court's finding that Father abandoned Child. Accordingly, the court did not err in finding Father abandoned Child under A.R.S. § 8-533(B)(1).

II. The juvenile court did not err in finding that termination was in Child's best interest.

¶17 Father contends termination of his parental rights is not in Child's best interest. The court must find by a

preponderance of the evidence that termination is in the best interest of the child. *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685; *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022. The court will not make an assumption "that a child will benefit from a termination simply because [s]he has been abandoned. Rather, [Mother] must prove an affirmative benefit to the child resulting from termination." *JS-500274*, 167 Ariz. at 5-6, 804 P.2d at 744-45. Termination is in the best interest of the child if she will benefit from the termination or would be harmed if the relationship continued. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App. 2008). Factors the court may consider include the child's adoptability or potential adoptive placement and whether the current placement is meeting the child's needs. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998). "This reasoning reflects an unspoken assumption that a parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing [a] natural parent." *JS-500274*, 167 Ariz. at 6, 804 P.2d at 745.

¶18 The juvenile court found that Father "has made promises in the past to see the child and has broken those promises and broken the heart of his daughter." The court also found that Child has forgotten that Father is her father, and

that Uncle is the father figure in her life, providing for her emotional, mental and physical needs. Mother expressed her concern that Child's safety and innocence will be in jeopardy if Father's rights are not terminated because he is abusive to the women in his life and associates with the wrong kind of people.

¶19 Father argues that by terminating his rights, Mother will forfeit the ability to seek child support from Father, which will be a detriment, not a benefit to Child. However, "[a]n order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other *except the right of the child to inherit and support from the parent.*" A.R.S. § 8-539 (emphasis added). Until a final order for adoption of Child is produced, Father will still be legally obligated to pay child support. *Id.* Therefore, the potential child support or lack thereof is not relevant in the determination of Child's best interest.

¶20 Father also improperly relies on *Maricopa County Juvenile Action No. JS-6831*, in which the court did not sever a mother's parental rights because it was not in the children's best interest. 155 Ariz. 556, 748 P.2d 785 (App. 1988). However, that case is distinguishable because the mother had consistent contact with the children and the father refused to return them to her. The mother in that case made continual

efforts to maintain a relationship with her children and the court found that "there were extenuating circumstances which prevented [her] from retrieving her children." *Id.* at 559, 748 P.2d at 788. Father on the other hand, over the course of four years, only spent half an hour with Child at a mall, had four or five short phone conversations with her, and sent her two cards.

¶21 The record supports the juvenile court's finding that termination of Father's parental relationship would be in Child's best interest. Father was verbally abusive and mistreated Mother and constantly inflicted confusion and disappointment in Child. The evidence shows Child's relationship with Father emotionally harms her, thus she would receive a greater benefit without this relationship than with it. Furthermore, Father himself admitted that the type of involvement he has had with Child is not in her best interest. Although the courts tend to hold that even an inadequate parent is better than no parent at all, in this case Child still has a natural parent, Mother, who she has grown up with and loves. Child is also in a loving relationship with Grandmother, Uncle, and Mother's boyfriend. Mother's boyfriend has expressed his desire to become a family. Therefore, although Child would lose her natural father, she will still have a natural parent, and two father figures that are more involved and supportive than her natural father ever was. Therefore, we find no error in the

juvenile court's finding that Mother proved by a preponderance of the evidence that terminating Father's parental rights is in the best interest of Child.

CONCLUSION

¶22 For the foregoing reasons, we affirm the juvenile court's termination of Father's parental relationship with Child.

DONN KESSLER, Judge

CONCURRING:

PATRICIA K. NORRIS, Presiding Judge

PHILIP HALL, Judge