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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL V.,) No. 1 CA-JV 11-0046
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
STEPHANIE P. and JAYDEN W.,) 103(G) Ariz. R.P. Juv. Ct.;
) Rule 28 ARCAP)
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JS506628

The Honorable Terri L. Clarke, Judge Pro Tempore

AFFIRMED

The Stavris Law Firm, PLLC
By Alison Stavris
Attorney for Appellant

Scottsdale

Law Offices of Kevin Jensen, PLLC
By Kevin Jensen
Attorney for Appellee Stephanie P.

Mesa

S W A N N, Judge

¶1 Michael V. ("Father") appeals the juvenile court's determination that he abandoned his son and that termination of the parent-child relationship was in his son's best interest. For the following reasons, we affirm.

*FACTS AND PROCEDURAL HISTORY*¹

¶12 Stephanie P. ("Mother"), then age 17, and Father, then age 20, met for one day in July 2001. A month later, Mother learned she was pregnant. When Mother was about three months pregnant, Father was deployed to Afghanistan and remained there until after Jayden W. was born in March 2002. Father returned to the United States in July 2002 and first visited Jayden that August.

¶13 Father's paternity was established in October 2002. In January 2003, the court ordered Father to provide medical insurance for Jayden, pay monthly child support starting March 2003, and pay \$5,948.81 in arrearages; Father's military wages were garnished.

¶14 Father was deployed to Iraq for the first six months of 2003. When he returned, Mother took Jayden to California to visit Father for the day. In November, Father visited Jayden in Phoenix. During that visit, Father told Mother he could not afford to come to Phoenix "every single month" but would like to take Jayden for "two to three weeks at a time every couple months," starting the next day for a one-week visit. Mother

¹ We review the facts in the light most favorable to affirming the juvenile court's order, and will affirm unless, as a matter of law, we find that no one could reasonably find evidence supporting the 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).

initially agreed, but changed her mind and did not take Jayden to Father the next day as planned.²

¶15 In October 2004, Father and Mother attended a court hearing to modify child support. After the hearing, Father visited Jayden and again asked Mother if he could take the child for a couple of weeks. Mother, however, refused because Father was "not here enough" and suggested that Father come to Phoenix monthly to see Jayden and establish a relationship with him. Father came to Phoenix in November and saw Jayden. Mother married Trevor P. ("Stepfather") in December.

¶16 In 2005, Father attended Jayden's birthday party and spent time with Jayden the next day. On the following day, Mother asked Father to relinquish his parental rights so that Jayden could be adopted and "sealed" in a religious ceremony.³ Father refused.

¶17 In April 2006, Mother spoke to Father by telephone to inform Father that Jayden had been molested by a babysitter and that criminal charges against the babysitter had been filed.

² Mother and Father disagreed about whether Mother told Father that she would not bring Jayden as planned. Mother testified that she told Father the next day that she changed her mind, and that after Father left town, neither parent tried to contact the other. Father testified that Mother simply did not show up and could not be reached for five to six months.

³ Stepfather testified that the ceremony binds family members "for eternity," but that Jayden could not be sealed until Stepfather adopted him.

Father called in May and June but stopped calling after that because Mother's voicemail switched to a "generic" message and he thought the phone was "shut off."⁴

¶18 In February 2010, Mother filed a petition to terminate Father's parental rights, alleging that Father had abandoned Jayden without just cause. The petition further alleged that Father had "very little contact" with Jayden since his birth and had not seen the child for nearly five years, that Father had not requested parenting time or kept Mother apprised of his whereabouts, and that he had not paid child support for more than one year. The petition also alleged that termination of Father's parental rights was in Jayden's best interests because it would allow Stepfather, a "Father figure" for most of Jayden's life, to adopt the child. Father contested the termination; he and Mother unsuccessfully participated in mediation, and the matter was set for trial. A guardian ad litem ("GAL") was appointed for Jayden.

¶19 In February 2011, the court found that Father had "not acted persistently since 2005 to establish or maintain a normal parental relationship with Jayden" and had an "inconsistent" record of making partial child support payments. The court

⁴ Neither Mother nor Father provided telephone records for this period. Mother conceded that Father may have made these calls.

ruled that Mother had demonstrated by clear and convincing evidence that Father had abandoned Jayden.

¶10 The court additionally found by a preponderance of the evidence that severance was in Jayden's best interests because the child had a parental relationship with Stepfather; had lived as a family with Mother, Stepfather and his sisters for most of his life; and had "no parental relationship" with Father, whom he had last seen in 2005. The court also believed it would be "difficult if not impossible" for Father, who lived out of state, to visit frequently or participate in reasonable reunification counseling with Jayden.

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

DISCUSSION

¶12 To terminate parental rights, a juvenile court must find that at least one statutory ground for termination exists and that termination is in the best interests of the child. See A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005). We will not reverse a termination order unless it is clearly erroneous. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). A finding is clearly erroneous if it is unsupported by reasonable evidence. *Moreno v. Jones*, 213 Ariz. 94, 98, ¶ 20, 139 P.3d 612, 616 (2006).

I. ABANDONMENT

¶13 Father first challenges the court's determination that he abandoned Jayden.

¶14 Arizona law defines "abandonment" as "the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." A.R.S. § 8-531(1). Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. *Id.*; see also *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249-50, ¶ 18, 995 P.2d 682, 685-86 (2000). 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. A.R.S. § 8-531(1). Conditions warranting severance must be proven by clear and convincing evidence. See A.R.S. § 8-537(B). Clear and convincing evidence is that which makes the alleged facts highly probable or reasonably certain. *Denise R.*, 221 Ariz. at 93, ¶ 2, 210 P.3d at 1264.

¶15 After October 2008, Father made no child support payments until March 2010, and he had no contact with Jayden "from 2006 onward."⁵ Those facts, absent any just cause,

⁵ In March 2010, Father made a \$3,555 payment. Mother filed her petition to terminate Father's parental rights on February 23, 2010, but Father testified at the severance hearing that he was unaware of the petition when he made the March 2010 payment.

justified the juvenile court's finding that Father abandoned Jayden. See A.R.S. § 8-531(1).

¶16 Father asserts that his efforts after 2006 -- including e-mails and telephone calls to Mother, contact with legal aid organizations, an attempt to glean Mother's address from ADES and sporadic child support payments -- were thwarted by various circumstances but are evidence of his intention to maintain a relationship with Jayden. Abandonment, however, is measured by Father's actual conduct, not his intent. See *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86. The record here is devoid of any just cause for Father's failure to maintain a parental relationship with Jayden. See *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994) (requiring an unwed father to "act persistently to establish the relationship however possible" with his child and "to vigorously assert his legal rights to the extent necessary").

A. Petition for Parenting Time

¶17 Father testified that he knew he had to file a petition with the court to establish parenting time with Jayden. But although he learned in late 2004 that Mother would not agree to his suggested parenting time schedule and that she wanted Father to relinquish his parental rights, Father never filed a

petition. During the severance hearing Father testified that the reason he never did so was because he did not know Mother's physical address and therefore there was "nowhere to serve her."

¶18 Father testified that he wrote letters asking legal aid organizations to help him establish parenting time with Jayden. To support that claim, Father entered into evidence two letters, written in October 2004, from two organizations that denied his request for help. One letter, however, explained that Father was seeking help to respond to a petition to modify child support, not to gain parenting time. The other letter provided names and telephone numbers of three different organizations that could assist Father in his endeavors. Father, however, testified that he never followed up on those referrals.

B. Physical Address

¶19 Father asserts that his contact with Jayden after November 2005 was limited because he did not know Mother's address and was "unable to locate" her or Jayden.

¶20 While the record demonstrates that Mother's address changed numerous times over the course of the proceedings, she never moved from the Phoenix area, and her phone number and

primary e-mail address remained constant.⁶ Mother also testified that she never "attempted to hide Jayden" from Father, never ignored Father's phone calls and never received any of the "20 to 30" e-mails Father testified that he sent to her from June 2006 until 2009.

¶21 Assuming *arguendo* the truth of Father's allegation that Mother refused to give him her physical address,⁷ the record here demonstrates numerous means by which Father could have contacted her. Mutual friends were often conduits of information between Mother and Father,⁸ so that Father could have asked those persons about Mother's location. The record also demonstrates that Father participated in at least one court hearing where he could have asked the court to order Mother to provide her address. Finally, Father testified that Mother would always drop off Jayden to visit him at pre-arranged times, which provided him an opportunity to complete service of a petition for parenting time.

⁶ Mother did admit, however, that before 2005 she had a month-to-month phone plan and was sometimes late paying her bills, so that her number could have been disconnected for a week.

⁷ Mother denied this allegation.

⁸ Mother worked with these friends. One introduced Mother and Father, told Father that Mother was pregnant, and told Mother when Father later married. Another helped Mother contact Father to talk about the pregnancy.

¶122 Father testified that he wrote to ADES in late 2008 or early 2009 to request her contact information, but that ADES did not respond. He offered into evidence a copy of a "draft" document -- undated and without any address -- to represent the contents of a letter he typed into the ADES website. But the document stated that Father already knew that Mother had married and what her new last name was, that he had found her social networking page on the internet, and that his friend confirmed that Mother and Stepfather lived in Chandler and wanted to adopt Jayden.

C. Child Support

¶123 Father's child support payments were sporadic and often partial. During the severance hearing, Father testified that he was consistent with child support payments while on active duty in the military and when he was working, because the payments were taken directly from his wages.⁹ At other times he made payments "[w]hen [he] could" and would use his annual tax refunds to pay overdue support. In 2009 he sought bankruptcy protection. Father also never provided health insurance for Jayden because he "didn't have time" to set it up during his deployments.

⁹ Father testified he was on active duty from March 2003 to September 2003, and June 2006 to November 2007. He worked for four months in 2008 before losing his job. In November 2008 he returned to school.

¶124 Viewing this record in the light most favorable to affirming the court's decision below, we find no error in the court's determination that Father abandoned Jayden. To the extent that conflicting evidence was presented by Mother and Father, the juvenile court was in the best position to weigh that evidence. See *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) ("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."); see also *Michael J.*, 196 Ariz. at 250, ¶ 20, 995 P.2d at 686 ("[Q]uestions of abandonment . . . are questions of fact for resolution by the trial court.") (quoting *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990)); *Denise R.*, 221 Ariz. at 93-94, ¶ 4, 210 P.3d at 1264-65 (stating that an appeals court should "affirm a lower court's findings of fact 'so long as they are supported by reasonable evidence'" (citation omitted)).

II. JAYDEN'S BEST INTERESTS

¶125 Father next asserts that Mother did not prove by a preponderance of the evidence that severance was in Jayden's best interests. We disagree.

¶126 "[P]reponderance of the evidence . . . is the proper standard of proof to be applied to the best interests inquiry

. . . ." *Kent K.*, 210 Ariz. at 288, ¶ 42, 110 P.3d at 1022. That standard "requires that the fact-finder determine whether a fact sought to be proved is more probable than not." *Id.* at 284, ¶ 25, 110 P.3d at 1018.

¶127 Here, Mother testified that she began dating Stepfather when Jayden was one and a half years old and that Jayden had enjoyed a "consistent family life" with Mother and Stepfather since then.¹⁰ She testified that Jayden viewed Stepfather "as his father" and would be confused if Father were reintroduced into his life because Jayden, by then eight years old, had not seen or had a relationship with Father since 2005. Mother explained that it was awkward for Jayden to explain to his friends why his last name was different from the rest of his family. Mother also testified that Jayden understood that he was not "sealed" to his family and that he wanted to be. Stepfather testified that he had a strong relationship with Jayden and that he wanted to adopt him "because he's my son" and to enable Jayden to be sealed to the family. Jayden's GAL recommended that Father's rights be terminated in order to give Jayden a "sense of permanency" and to "legalize this relationship that already exists between [Stepfather] and Jayden," especially since "no relationship" existed between

¹⁰ Jayden's two sisters, born to Mother and Stepfather, were also part of the family life Mother referenced.

Father and Jayden. The court's ruling detailed specific findings why termination was in Jayden's best interest. See A.R.S. § 8-538 (requiring written findings when the court terminates the parent-child relationship).

CONCLUSION

¶28 We find no error in the court's ruling that termination was in Jayden's best interest. For the foregoing reasons we affirm the juvenile court's order terminating Father's parental rights.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

JON W. THOMPSON, Judge

/s/

JOHN C. GEMMILL, Judge