

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



DIVISION ONE
FILED: 10/20/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

REBECCA S.,) 1 CA-JV 11-0092
)
Appellant,) DEPARTMENT A
)
v.) MEMORANDUM DECISION
)
) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
AMBER S., KYLE R., VICTORIA) ARCAP 28)
P.,)
)
Appellees.)
)
)
)

Appeal from the Superior Court in Navajo County

Cause No. S0900SV201000028/S0900GC201000077

The Honorable Michala M. Ruechel, Judge

AFFIRMED

Law Office of Michelle L. Ratner
by Michelle L. Ratner
Attorney for Appellant

Flagstaff

Riggs, Ellsworth & Porter, P.L.C.
by Michael R. Ellsworth
Attorney for Appellees

Show Low

B A R K E R, Judge

¶1 Appellant, Rebecca S. ("Mother"), appeals the superior court's order terminating her parental rights to her daughter, Victoria, on grounds of abandonment under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (2010). For the following reasons, we affirm.

Facts and Procedural Background

¶2 Mother gave birth to Victoria in October 2007. At the time, Mother was living in Utah with Victoria, Victoria's father, and T.S., another of Mother's children. Soon after the birth of Victoria, Mother's ex-husband began litigation to obtain full-custody of his three children with Mother.¹ Mother sent Victoria to stay with her parents in Arizona because she could not prepare for the litigation involving her ex-husband while caring for the newborn. Victoria eventually came back to live with Mother in Utah.

¶3 In the Spring of 2008, when Victoria's father was arrested and being investigated and charged for child abuse allegations, Mother again sent Victoria, along with T.S., to live with her family in Arizona. Mother sent the children away because she did not want them to be in the environment created by the arrest and investigation. Victoria lived with Mother's

¹ Mother's ex-husband is the father of three children for whom he is fighting for custody in a separate case. He is not Victoria's father.

sister and brother-in-law ("Appellees") in Arizona until July 2008.

¶4 In July, Mother enlisted the police to retrieve Victoria and T.S. from Appellees in Arizona.² Mother brought the police with her because she was apprehensive about the way Appellees would react; she wanted "[t]o keep the peace." Mother first went to her mother's house, and when she did not find the children there, she took the police to Appellees' house. After the incident in July, Victoria and T.S. stayed with Mother in Utah until November or December of 2008. However, because Mother was working during Christmas and had to place Victoria in full-time day care, she decided to send the girls back to her parents in Arizona for Christmas.

¶5 After Mother completed her schooling in January 2009, she moved to Kingman to be closer to her family and her daughters. However, Mother was unable to find work, so she moved back to Utah and did not take the children with her. In early 2009, Mother was pregnant and sick during the course of her pregnancy, and she underwent a Caesarean section in September 2009. Feeling that she was unable to care for Victoria, Mother continued to leave Victoria in the care of

² At the trial, Mother testified that she believed she was sending her children to live with her parents. However, it was apparent that the children spent the majority of their time living with Appellees.

Appellees in Arizona where Victoria has lived from December 2008 to the present.

¶6 Between December 2008 and June 2010, Mother had limited contact with Victoria. During this time Mother called her mother to ask about Victoria, but she did not communicate with Victoria directly while Victoria was in Arizona. Mother sent clothing and other items for Victoria on isolated instances, but she did not send regular cards or monetary support. In November 2010, Mother had a visit with Victoria. The visit did not go well. Victoria did not recognize Mother and the two were unable to bond. Mother missed two other scheduled visits with Victoria in January and February. As to the visitation scheduled in January, Mother was unable to attend due to illness. Weather delays during her travel from Utah to Arizona prevented her from attending the visitation scheduled in February.

¶7 In November 2009, Mother signed a consent to guardianship to allow Appellees to obtain medical care and other care for Victoria. Appellees did not file the consent or seek guardianship of Victoria for about eight months. On July 30, 2010, Appellees filed a petition for temporary appointment as guardians for Victoria. The petition requested emergency appointment without notice, citing Appellees' fear that Victoria would be taken by her father's family. The court granted

emergency guardianship to Appellees without restrictions and set a hearing for August 24, 2010.

¶18 Prior to the hearing on August 24, Mother filed an objection to the petition for guardianship; she stated that her family had misled her when she signed the consent to guardianship in November 2009. At the hearing, the court appointed a Guardian Ad Litem for Victoria and set a further hearing on the Guardianship for September. In September 2010, Appellees filed a Petition for Termination of Parent Child Relationship, and the court combined the termination matter with the guardianship matter. At the combined hearing on November 9, 2010, Mother agreed to leave the temporary guardianship of Victoria in place. Mother was not represented at the hearing, but she advised the court she understood her rights and had not been forced, threatened, or coerced into the agreement.³ The Guardian Ad Litem agreed that the temporary agreement was in Victoria's best interests.

¶19 In December 2010, Mother filed a motion to regain custody of Victoria. On January 6, 2011, the court held a hearing, heard argument, and denied the motion finding that the guardianship was in Victoria's best interests. A severance

³ Mother was subsequently appointed counsel in the severance matter.

trial was set for March 3, 2011. The parties waived a social study.

¶10 After the two-day trial, the court granted Appellees' petition to sever and petition for guardianship. The court found by clear and convincing evidence that Mother had abandoned Victoria pursuant to A.R.S. §§ 8-533, -531. The court further found that Mother failed to maintain a normal parent-child relationship for a period of eighteen months without good cause, had de minimus contact with Victoria, and provided minimal support and communication. The court found by a preponderance of the evidence that severance of the parent-child relationship was in the best interests of Victoria. Mother timely appealed, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 8-235(A) (2007).

Discussion

¶11 On appeal, we do not reweigh the evidence nor make credibility determinations; instead, we examine the record merely to determine whether there is sufficient evidence of the grounds for termination. *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."). We will affirm a juvenile court's

decision unless, as a matter of law, no reasonable fact-finder could have found the evidence supported the statutory grounds for termination or there are errors of law. *Denise R. v. Ariz. Dep't. of Econ. Sec.*, 221 Ariz. 92, 95, ¶ 10, 210 P.3d, 1263, 1266 (App. 2009).

¶12 Mother argues that (1) the procedure for finding the legal concept of abandonment as defined by A.R.S. § 8-531 is unconstitutional, (2) the court abused its discretion by allowing Appellees to sabotage return of the child to Mother, (3) the court's findings were unsupported by the evidence, and (4) the court did not consider important issues when considering best interests.

1. Constitutionality of Abandonment Statute

¶13 Mother challenges the constitutionality of the court's termination of the parent-child relationship on grounds of abandonment. She argues that under *Troxel v. Granville*, 530 U.S. 57 (2000), the court failed to give special consideration to her determination that leaving Victoria with Appellees was in the child's best interests. The Fourteenth Amendment protects the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 65. The procedures for termination of the parent-child relationship on the grounds of abandonment pursuant to A.R.S. §§ 8-531, -533 respect these fundamental rights. See *Kent K. v.*

Bobby M., 210 Ariz. 279, 282, ¶ 11, 110 P.3d 1013, 1016 (2005) (Fundamental rights involved in severance cases "can be overridden only by the combined elements of statutorily defined improper behavior by the parent and the child's best interests."). The statute defines abandonment as "the failure of a parent to provide reasonable support and to maintain regular contact with the child." A.R.S. § 8-531(1). The statute contemplates that circumstances may arise when a parent would decide it is best for the child to be placed in the custody of another person; thus, it provides that "[f]ailure to maintain a normal parental relationship with the child *without just cause* for a period of six months constitutes prima facie evidence of abandonment." *Id.* (emphasis added). This statute has been held to be constitutional. See *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶¶ 11-12, 995 P.2d 682, 684-85 (2000) (recognizing that the fundamental right to parent can be terminated if the court finds, by clear and convincing evidence, one of the statutory grounds set out in § 8-533 and that the termination is in the child's best interests).

¶14 The facts here do not support a determination that the statute is unconstitutional as applied, as discussed in the section on sufficiency of the evidence. The facts supporting abandonment were not that Mother permitted a guardianship, but

that she failed to have any kind of reasonable contact or relationship with Victoria during the time Victoria was with Appellees. A parent must exercise the fundamental parental right in order for it to be protected. See *Troxel*, 530 U.S. at 68 (stating that the State will not interfere with the "private realm of the family" "so long as a parent adequately cares for his or her children"). Thus, we find no error.

2. Court's Exclusion of T.S.'s Letter

¶15 Mother next contends that the court abused its discretion in allowing Appellees to sabotage the return of Victoria to Mother. Mother develops this argument as a claim that the court erred in excluding from evidence a letter written by T.S.. Unless the juvenile court abused its discretion, we will not disturb the court's ruling on the admissibility of evidence. *In re Jonah T.*, 196 Ariz. 204, 208, ¶ 15, 994 P.2d 1019, 1023 (App. 1999).

¶16 To show that severance was not in Victoria's best interests, Mother introduced evidence that two of Mother's brothers, who were living either with Mother's mother or in the area, were being charged or investigated for child molestation. To further support this argument, Mother sought to admit a letter written by T.S. containing a description of events she experienced while living with Appellees and with Mother's mother. The court determined that there was not sufficient

indicia of reliability under the circumstances, and did not admit the letter. T.S. had written the letter "a couple of weeks" before the trial. Mother testified that T.S. "wanted to write a letter to the courts, because she knew [Mother] was fighting for Victoria." When T.S. testified telephonically during the trial, Mother had the opportunity to elicit the same evidence that was contained in the letter. We conclude that the court did not abuse its discretion in excluding the letter.

3. Sufficiency of the Evidence

¶17 Mother next argues that the court's findings were not supported by the evidence. Mother does not contest that Victoria has resided with Appellees from December 2008 to the present or that Mother's contact with Victoria during that period consisted of only three visitation days. Instead, Mother's argument focuses on the court's failure to consider the intentions behind her actions. This argument necessarily fails because:

[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct: the statute asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship.

Michael J., 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86 (expressly noting that the "decision to consider a parent's

conduct rather than his subjective intent fully accorded with the legislature's decision to delete the intent language from the definition of abandonment"). The court properly focused on Mother's conduct.

¶18 Furthermore, the evidence supports the court's findings: Mother did not maintain regular contact, provide reasonable support, or provide normal supervision for more than six months. For a period of eighteen months, Victoria resided in Arizona with Appellees. During that time, Mother called her mother weekly for updates on Victoria, but she did not call Appellees or make any effort to have contact with Victoria. While life events may have prevented Mother from physically caring for her daughter for a time, these were not just cause for her failure to maintain a parent-child relationship. See *Appeal in Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 101, 876 P.2d 1121, 1136 (1994) (legitimate reasons for failure to act may still not rise to the statutorily required good cause). Mother sent a few items for Victoria, such as shoes, clothes, etc. "probably at least four times" throughout the period in which Victoria was living with Appellees. Mother sent fifty dollars for care and maintenance only once in February 2011. "What constitutes reasonable support, regular contact, and normal supervision varies from case to case." *Id.* at 96-97, 876 P.2d at 1131-32 (When

"circumstances prevent [the parent] from exercising traditional methods of bonding . . . [the parent] must act persistently to establish the relationship however possible and must vigorously assert his [or her] legal rights."). Though we trust Mother meant well, there was sufficient evidence to support the legal standard for abandonment.

4. Best Interests

¶19 Lastly, Mother argues that the court did not consider important issues when it determined whether severance was in the best interests of Victoria. The court must find by a preponderance of the evidence that severing the parental rights is in the best interests of the child. *Kent K.*, 210 Ariz. at 288, ¶ 42, 110 P.3d at 1022. To make this 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." *Mary Lou C. v. Ariz. Dep't. of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004) (quoting *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990)). The court made specific best-interest findings as to how the severance would provide needed stability and permanency. The court found that Victoria was tightly bonded with Appellees, they were the only parents she knew, and she had resided with them since 2008. The record supports these findings. Victoria is extremely comfortable with Appellees; she

is affectionate with them and views them as her parents. There was no error on these grounds.

Conclusion

¶20 Finding sufficient evidence to support the termination of Mother's parental rights, we affirm.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

PATRICK IRVINE, Judge