IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

PHILLIP J.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND M.J.,
Appellees.

No. 2 CA-JV 2014-0159
Filed March 20, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD184755
The Honorable Catherine M. Woods, Judge

AFFIRMED AS CORRECTED

COUNSEL

Sarah Michèle Martin, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Phillip J. appeals from the juvenile court's October 3, 2014, order terminating his parental rights to his daughter, M.J., born in February 2013, on grounds of both nine- and six-month out-of-home placement.[1] *See* A.R.S. § 8-533(B)(8)(a), (b). Phillip contends there was insufficient evidence to support the termination of his rights based on the asserted grounds and that termination of his parental rights was not in M.J.'s best interests. For the reasons set forth below, we affirm the court's order as corrected.

¶2 Before the juvenile court may terminate a parent's rights to his or her child, it must find, based on clear and convincing evidence, at least one of the statutory grounds for termination and a preponderance of evidence establishing that severance of the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). On appeal, we view the evidence and all reasonable inferences thereof in the light most favorable to upholding the juvenile court's order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We do not reweigh the evidence presented to the juvenile court because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the

[1]The juvenile court also terminated the parental rights of M.J.'s mother, who is not a party to this appeal.

credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Consequently, we will affirm the court's order if there is reasonable evidence in the record supporting the findings upon which the order is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 In March 2013, when M.J. was less than two months old, the Department of Child Safety[2] (DCS) removed her from the mother's home after the mother was arrested on an outstanding warrant; the mother and Phillip were not married and there was no one to care for M.J. DCS filed a dependency petition in April 2013, alleging as to Phillip that M.J. was dependent due to abuse and/or neglect, specifically noting he had left her in the care of the mother, whose rights to another child had been severed, and despite knowing the mother had a history of substance abuse. DCS initially offered Phillip a variety of services including supervised visitation, participation in child and family team meetings, drug testing, counseling, and parenting classes. In addition, Phillip agreed to "[p]articipate in [o]ther [r]ecommended [t]reatment" during the dependency. The court found M.J. dependent as to Phillip in July 2013.

¶4 In August 2013, the DCS case manager reported that, although Phillip had made progress with the case plan requirements, he had not attended any of the required healthy relationships classes or addressed his ongoing domestic violence issues.[3] Phillip was arrested and taken into custody in January 2014

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[2]DCS is substituted for the Arizona Department of Economic Security (ADES) in this decision. *See* 2014 Ariz. Sess. Laws 2nd Spec. Sess., ch. 1, §§ 6, 20, 54. For simplicity, references to DCS encompass both ADES and Child Protective Services, formerly a division of ADES.

[3]As reported in an August 1, 2013 Progress Report to the Juvenile Court, the Oro Valley Police Department had been called to Phillip's home "eight times [since February 2013] regarding domestic disputes between the parents."

"for assaulting the mother" and on unrelated felony charges. The case plan was changed to severance and adoption at a dependency review hearing in April 2014. DCS filed a motion to terminate Phillip's rights to M.J. on time-in-care grounds. *See* A.R.S. § 8-533(B)(8)(a), (b). Following a three-day severance hearing, Phillip's rights to M.J. were terminated.[4]

¶5 On appeal, Phillip raises only one argument related to the statutory grounds for termination, to wit, that his "active participation in case plan services both before and after his incarceration provide evidence contrary" to the juvenile court's finding he had substantially neglected and willfully refused to remedy the circumstances causing the out-of-home placement. *See* A.R.S. § 8-533(B)(8)(a), (b). He specifically asserts that because healthy relationships, domestic violence, and anger management services were not part of the initial case plan, the court improperly relied on his failure to participate in those services.

¶6 The case manager testified that Phillip's case plan required his participation in services related to healthy relationships, anger management, and domestic violence; that these requirements were discussed at a November 2013 adult recovery team meeting which Phillip attended; and that she had emphasized the need to participate in these services before and during the November meeting. But it does not appear Phillip's participation in domestic violence services was expressly required in the written case plan. However, Phillip signed a case plan in June 2013 indicating he would "not engage in domestic violence of any kind including verbal and physical violence with others," that he "will know who

[4]Although the juvenile court stated it was severing Phillip's parental rights to M.J. based on A.R.S. § 8-533(b)(8)(a), (c), as DCS had mistakenly alleged in the motion to terminate, based on the record it is clear from the text of the order the parties and the court instead intended to rely on subsections (a) and (b) ("Length of Time in Care–6 months"). We therefore order the court's October 3, 2014, termination order corrected to reflect termination based on A.R.S. § 8-533(B)(8)(a) and (b).

to contact when he is feeling angry and/or frustrated to help control his behaviors and temper," and that he "will know the effects of domestic violence on his child." The plan also required that he participate in, inter alia, "Healthy Relationships Education," "Anger Management," and possibly domestic violence classes. Moreover, at trial, Phillip apparently did not dispute he was aware, at least as of November 2013, that his case plan required his participation in domestic violence classes, and he acknowledged he was required to participate in anger management, healthy relationships, and individual therapy as early as June 2013.

¶7 In addition, the Progress Report to the Juvenile Court dated August 1, 2013, provided Phillip was required to "participate in and benefit from healthy relationships classes," and noted that, "[d]ue to the allegations of domestic abuse" against Phillip, he "will be required to participate in and benefit from domestic violence classes." In fact, the DCS case manager testified at trial that the case manager from Marana Behavioral Health had reported that Phillip had "declined [participation in heathy relationships, anger management, or domestic violence services] because he felt he didn't need domestic violence education or anger management." The DCS case manager also opined Phillip had "substantially neglected his case plan prior to his incarceration," and that he was "resistant to treatment and continue[d] to minimize the issues that brought his child into care." Finally, although Phillip relies on the fact that the domestic violence charges against him ultimately were dropped, the court noted multiple indicators that he had engaged in violent activities.

¶8 The DCS case manager also reported that, after Phillip was placed in custody in January 2014, she "was unable to locate him [by] searching the inmate database" for the Pima County Jail and testified he did not maintain contact with her during his five-month incarceration or attempt to do anything to further his case plan.[5] Phillip's counselor testified that Phillip could have requested

[5]Phillip testified that there were no services available to him in the "protective segregation" unit at the jail, in which he was placed apparently at his own request.

he be evaluated for domestic violence classes as early as August or November 2013, and added that the "full course for domestic violence" takes twenty-six weeks to complete. Therefore, to the extent Phillip argues his having re-engaged in services once he was released from custody in June 2014 somehow made up for his lack of progress during the dependency, including the time he had spent in custody, it was, put simply, too little, too late. *See In re Maricopa Cnty. Juv. Action No. JS-501568,* 177 Ariz. 571, 577, 869 P.2d 1224, 1230 (App. 1994) (mother's successful rehabilitation in eight months before hearing "too little, too late" in light of failure to remedy addiction within first year child out of home pursuant to court order).

¶9 Notably, the juvenile court found Phillip's testimony that he had been unaware he was required to participate in services for individual therapy, healthy relationships, anger management, and domestic violence "lack[ed] credibility," pointing out that his case manager had "repeatedly" reminded him to participate in such services and that "domestic violence is a serious and significant issue for [Phillip], and has been for years." We will not disturb the court's credibility finding. *See Oscar O.,* 209 Ariz. 332, ¶ 4, 100 P.3d at 945. Accordingly, the court did not abuse its discretion by finding that, even though Phillip "participated in some of his services . . . [h]e failed and/or refused to participate in individual therapy, healthy relationships classes, and domestic violence/anger management classes until sometime after [DCS] filed its Motion for Termination," thereby substantially neglecting or willfully refusing to remedy the circumstances that caused M.J.'s out-of-home placement. Thus, the court did not err in concluding termination of Phillip's parental rights was warranted pursuant to § 8-533(B)(8)(a) and (b).

¶10 Phillip also contends "[t]here was no evidence whatsoever in support of the [juvenile] court's finding that termination of [M.J.'s] legal relationship with [Phillip] is in [M.J.'s] best interests." To establish that termination is in a child's best interests, a preponderance of the evidence must show the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Id.* ¶ 6; *Kent K.,* 210

Ariz. 279, ¶ 22, 110 P.3d at 1018; *see also In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990) (to establish severance in child's best interests, "petitioner might prove that there is a current adoptive plan for the child").

¶11 The case manager testified that M.J.'s placement with her paternal grandparents is an adoptive placement; she is an adoptable child; by terminating Phillip's parental rights to her "she will not be subject to domestic violence in the home and [Phillip's] criminal lifestyle"; and, an adoption would provide her with permanency, safety, and stability. The paternal grandmother testified that if Phillip's parental rights were terminated, she intended to adopt M.J., which she believed would be in M.J.'s best interests under those circumstances.

¶12 In its severance ruling, the juvenile court determined M.J. "is adoptable and she is in a safe, stable, and supportive home with her grandparents," who are willing to adopt her. Pointing to Phillip's prior criminal activity and the felony charges he was currently facing for a weapons violation and burglary, as well as the incidents of domestic violence between the parents, the court concluded that "into the foreseeable future, [Phillip] is unable to provide a safe, stable and supportive living environment" for M.J. The court thus correctly found that terminating Phillip's parental rights "would free [M.J.] for adoption, and provide the permanency that she needs and deserves."

¶13 Finding no abuse of the juvenile court's discretion and no merit to either issue raised on appeal, we affirm the court's order terminating Phillip's parental rights to M.J. as corrected.