IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

D.Y.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND LARETHA B.,
Appellees.

No. 2 CA-JV 2015-0048
Filed July 31, 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NOT FOR PUBLICATION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. JD179951
The Honorable Jane Butler, Judge

AFFIRMED

COUNSEL

Pima County Office of Children's Counsel
By John Walters, Tucson
Counsel for Appellant

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

Emily Danies, Tucson
Counsel for Appellee Laretha B.

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brammer[1] concurred.

H O W A R D, Judge:

¶1 Nine-year old D.Y., born in November 2005, appeals from the juvenile court's February 2015 order denying his motion to terminate the rights of his parents.[2] D.Y. challenges the court's dismissal of his claim that severance was required based on out-of-home placement for fifteen months or longer and its finding that severance was not in his best interests. *See* A.R.S. § 8-533(B)(8)(c). For the following reasons, we affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). In 2006, the

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]After D.Y.'s biological father admitted the allegations in the motion to sever and the juvenile court found the grounds for termination had been proven as to him, the court denied termination as to the father because D.Y. had failed to prove termination was in his best interests. However, because D.Y. has not made any arguments on appeal specific to the father, nor has the father participated in the appeal, we do not address the portion of the court's ruling related to him.

Department of Child Safety (DCS)[3] filed the first of three dependency petitions in this matter and DCS took custody of D.Y. and his sister; that dependency matter was dismissed in 2008 and the children were returned to the mother.[4] DCS again took temporary custody of D.Y., his sister, and his half-brother in 2010, when it filed a second dependency petition; that dependency was dismissed and the children were returned to the mother and step-father in 2011. In October 2012, DCS filed a third dependency petition alleging the mother and step-father had engaged in domestic violence in front of the children and had physically abused the children, both parents were using marijuana and methamphetamine, and the mother was not addressing her mental health issues. The mother and step-father admitted the allegations in the petition and the children were adjudicated dependent in December 2012.

¶3 The mother and step-father essentially have complied with the case plan and participated in services continuously since March 2013. In April 2014, D.Y., who had been placed with his step-father's aunt, began refusing visits with the mother and step-father. DCS case manager Vanessa Tadeo reported "that there are specific relatives [including the aunt] who continually express their disapproval for family reunification and it is negatively impacting [the] children and their decision not have contact with their parents."

¶4 In August 2014, D.Y.'s appointed counsel, with the consent of D.Y.'s guardian ad litem, filed a motion to terminate the parental rights of the mother and D.Y.'s biological father, asserting as to both parents the grounds of neglect, abuse and length of time in care and, as to the father, the additional ground of abandonment.

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[3]The Department of Child Safety (DCS) is substituted for the Arizona Department of Economic Security in this decision. *See* 2014 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 1, § 20.

[4]The dependencies of D.Y.'s sister, born in November 1999, and half-brother, born in November 2007, have been terminated and those children have been returned to the home the mother shares with the step-father.

D.Y. further alleged termination of the parent's rights was in D.Y.'s best interests. *See* A.R.S. § 8-533(B)(2), (8)(c).

¶5 After a four-day contested termination hearing in December 2014, the juvenile court denied D.Y.'s motion, finding that although he had established the grounds of neglect and abuse, § 8-533(B)(2), he had failed to prove termination was in his best interests. The court also found D.Y. had failed to prove the time-in-care ground, § 8-533(B)(8)(c), and thus granted the mother's motion for a directed verdict at the conclusion of his case. The court also made the following findings regarding best interests:

> [D.Y.] has not identified a benefit he would gain from permanent placement with his current placement [the aunt] over permanent placement with his mother, excepting the fulfillment of his own preferences. This alone is not sufficient to sustain a finding of best interests. In addition, no evidence was introduced suggesting that in the event his current placement could not adopt him there would be a clear permanent plan for him. The Court is left to compare one permanent placement which service providers say is adequate, and which the Court has previously found to be adequate, the mother, to another permanent placement which documentary evidence suggests is adequate, the current placement. As a result, there is no clear benefit to [D.Y.] for a severance of his parental rights as a result of the availability of this permanent placement. There being no other basis for a best interests finding alleged in the motion or introduced via evidence at trial, the allegation of best interests by [D.Y.] is DENIED.

¶6 To terminate a parent's rights a juvenile court must find at least one of the statutory grounds for termination set forth in § 8-533(B) is supported by clear and convincing evidence. *Michael J. v. Ariz. Dep't of Econ. Sec.,* 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d 682, 684-85, 687 (2000). The court also must find by a preponderance of the evidence that severing the parent's rights is in the child's best interests. *See* § 8-533(B); *Kent K. v. Bobby M.,* 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). To establish that termination is in a child's best interests, a petitioner must show how the child would benefit from termination or be harmed by the continuation of the parent-child relationship. *In re Maricopa Cnty. Juv. Action No. JS-500274,* 167 Ariz. 1, 5, 804 P.2d 730, 734-35 (1990).

¶7 On appeal, D.Y. argues the juvenile court abused its discretion in concluding he had failed to establish termination was in his best interests. Pointing out that the court found he had failed to identify a benefit from placement with his aunt over his mother "beyond a fulfillment of his own preferences," D.Y. maintains the court "only" considered this factor in making its best interests determination and also asserts the written ruling was deficient. He argues the record is "replete with testimony about the benefits [he] would gain from severance," including "permanency, stability, safety, and the fulfillment of [his] preferences," as well as the harm he will suffer if severance is not granted. Viewing the evidence in the light most favorable to upholding the court's order, *Denise R.,* 221 Ariz. 92, ¶ 10, 210 P.3d at 1266, we cannot say the court abused its discretion in finding D.Y. failed to establish severance was in his best interests.

¶8 D.Y. correctly points out that psychologist Daniel Overbeck, who had conducted a psychological evaluation on D.Y., testified that permanency and stability were "critical" for D.Y., and that "[a]n abrupt" move from his current placement with his aunt, where he feels safe, would not be in his best interests. Additionally, Overbeck testified about D.Y.'s fear from his step-father's treatment of him and "the sadness that his mother didn't protect him from that," and estimated it would take "a minimum of a year to a year and a half" for D.Y. to transition into the mother's home, although he later added that "[i]t could take less." D.Y. also discusses at

length incidents that have occurred since his siblings were returned to the mother's care, suggesting those events demonstrate that the juvenile court's best-interests finding was incorrect.

¶9 However, in addition to the evidence D.Y. has summarized accurately on appeal, the juvenile court was presented with significant evidence that supported its ruling. As DCS correctly points out, the record does not suggest the court did not consider and weigh all of the evidence before it. *See Fuentes v. Fuentes,* 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (appellate court presumes trial court considered evidence presented).

¶10 Notably, Overbeck also testified that "in some cases it's entirely possible for a child and the original caregiver [mother] to be reunited successfully," and noted that the recent DCS reports he had reviewed "were very complimentary" to the mother and step-father's "commitment and progress in their recovery." He additionally testified that he often had worked with children, like D.Y., who did not want to participate in therapy, but noted "there are . . . established ways" to deal with such children so they become "fully involved." Overbeck also stated that if the motion to sever were granted and if D.Y. were unable to have contact with his siblings as a result, he would "be left with unresolved feelings toward his sister" and he would continue to miss his brother, whom he already missed "tremendously." Case manager Tadeo similarly opined that it would be in D.Y.'s best interests to work through certain issues with his sister and have the opportunity to live with his brother.

¶11 Tadeo also testified that the mother had complied fully with her case plan, characterized her progress as "tremendous," and opined the mother was "willing and capable to protect her children." She added that despite D.Y.'s expressed desire not to return to the mother, she believed reunification with the mother was in his best interests and opined that additional time was necessary to further that end. *Cf. Desiree S. v. Dep't of Child Safety,* 235 Ariz. 532, ¶¶ 11, 13, 334 P.3d 222, 224-25 (App. 2014) (child's reluctance to participate in services or return to mother "at best" relevant to best interests determination, but insufficient to determine mother unable to parent child in near future). Tadeo also testified she had concerns

about the aunt, who "intentionally or not," had failed to support transition efforts to reunify the family.

¶12 Child and family therapist Rena Sabey testified that D.Y. had left a 2014 therapy session with his mother and step-father looking "really happy" and "skipping." She added that the aunt had "hindered having the family therapy session at the school," leading her to recommend that D.Y.'s placement be changed. Sabey opined that termination of the mother's parental rights was not in D.Y.'s best interests, and instead suggested the parties resume family therapy sessions to further the goal of family reunification.

¶13 As the record establishes, the juvenile court had reasonable evidence to support its best-interests finding. *See In re Maricopa Cnty. Juv. Action No. JS-8441,* 175 Ariz. 463, 465, 857 P.2d 1317, 1319 (App. 1993) ("[T]he issue on appeal is whether any reasonable evidence supports the juvenile court's findings."), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, ¶¶ 12, 41, 110 P.3d at 1016, 1022. Nor is this a situation where the evidence suggests there is "no hope" D.Y. will ever be reunited with his mother. *See Ariz. Dep't of Econ. Sec. v. Oscar O.,* 209 Ariz. 332, ¶ 16, 100 P.3d 943, 948 (App. 2004). To the extent D.Y. suggests we reweigh the evidence on review, we will not do so. *Jesus M. v. Ariz. Dep't of Econ. Sec.,* 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002).

¶14 Because we find the juvenile court did not abuse its discretion in concluding that termination is not in D.Y's best interests, we decline to address D.Y.'s other argument, that the court erred by dismissing the time-in-care ground. Absent a finding that termination was in D.Y.'s best interests, which the court did not make here, it could not terminate the mother's parental rights. *See Maricopa Cnty. No. JS-500274,* 167 Ariz. at 7, 804 P.2d at 736 (separate finding of best interests "is always necessary" to terminate parent's rights); *see also In re Maricopa Cnty. Juv. Action No. JS-6831,* 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988) (best interests of child required denial of severance petition despite finding statutory ground to terminate). And, in light of the undisputed finding that the ground of abuse and neglect was proven, there is no reason for us to address D.Y.'s argument regarding the time-in-care ground in any event. *Cf. Michael J.,* 196 Ariz. 246, ¶ 27, 995 P.2d at 687 (any

proven statutory ground adequately sustains juvenile court's severance order).

¶15 The juvenile court did not abuse its discretion in denying D.Y.'s motion to terminate. Accordingly, we affirm its order.