IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JOSE M.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, V.M., V.-M., AND C.M.,
Appellees.

No. 2 CA-JV 2017-0129
Filed November 14, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100JD201300138
The Honorable DeLana J. Fuller, Judge Pro Tempore

AFFIRMED

COUNSEL

Rosemary Gordon Pánuco, 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 Staring authored the decision of the Court, in which Judge Espinosa and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Jose M. appeals from the juvenile court's March 2017 order terminating his parental rights to V.M., V.-M., and C.M., born in 2011, 2012, and 2013, based on the grounds of mental illness and mental deficiency and length of time in court-ordered care (fifteen months).[1] *See* A.R.S. § 8-533(B)(3), (8)(c). Jose asserts there was insufficient evidence to support the court's findings of termination based on mental illness or mental deficiency, the reunification services he received were insufficient, and termination was not in the children's best interests. For the reasons that follow, we affirm.

¶2 A juvenile court may terminate a parent's rights if it finds both clear and convincing evidence of at least one statutory ground for termination and a preponderance of the evidence that termination of the parent's rights is in the child's best interests. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 32, 41 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10 (App. 2009). And, we view the evidence in the light most favorable to upholding the juvenile court's ruling. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2 (App. 2008).

Factual and Procedural Background

¶3 The Department of Child Safety (DCS) took the children into temporary custody in September 2013, due to the mother's substance abuse and neglect and Jose's failure to protect them from the mother or provide for them. In December 2013, the children were adjudicated dependent as

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

to him. During the course of the dependency, DCS offered Jose various services, including visits with the children supervised by a Spanish-speaking parent aide, referrals for substance abuse treatment, drug testing, psychological and psychiatric evaluations, a bonding assessment, parenting and domestic violence classes, written case plans in Spanish, and the assistance of a Spanish-speaking interpreter "to facilitate case management and services." In July 2015, DCS filed a motion to terminate Jose's parental rights. In December 2015, the juvenile court permitted DCS to withdraw its motion in order to allow Jose "additional time to participate in services."

¶4 Jose completed a psychological evaluation and a bonding assessment in 2016. In August 2016, the juvenile court changed the case plan to severance and adoption and DCS filed a second motion to terminate Jose's parental rights based on mental illness or mental deficiency and time-in-care grounds. *See* § 8-533(B)(3), (8)(c). After a one-day contested severance hearing held in January 2017, the court granted DCS's motion. The court found sufficient evidence to terminate Jose's parental rights based on all of the grounds alleged and found that termination was in the children's best interests. This appeal followed.[2]

Out-of-Home Placement and Reasonable Efforts

¶5 While Jose generally challenges the appropriateness of the services he received, he does not specifically challenge the time-in-care ground in his opening brief. Accordingly, although we address the appropriateness of the services provided as to the time-in-care ground, because Jose has abandoned and waived any other claim related to that ground, we do not address it.[3] *See Crystal E. v. Dep't of Child Safety*, 241 Ariz. 576, ¶ 5 (App. 2017) (failure to challenge termination on specific statutory ground constitutes abandonment and waiver on appeal). Moreover, in light of our ruling that appropriate services were provided, as explained

[2]We dismissed Jose's first notice of appeal without prejudice to seek leave to file a delayed or amended notice of appeal. *Jose M. v. Dep't of Child Safety, V.M., V.-M., and C.M.*, No. 2 CA-JV 2017-0054 (Ariz. App. Jul. 3, 2017) (order).

[3] In his reply brief, Jose asserts that he is also challenging the sufficiency of the evidence for the out-of-home placement ground. Jose did not raise this argument in his opening brief, and we thus do not consider it. *See Nelson v. Rice*, 198 Ariz. 563, n.3 (App. 2000).

below, and in the absence of any other challenge on the time-in-care ground, we need not address the arguments Jose raises regarding the mental illness or mental deficiency ground. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 3 (App. 2002) (appellate court need not consider challenge to alternate grounds for severance if evidence supports any one ground).

¶6 In a related argument, DCS argues that, because Jose raised them for the first time on appeal, he has waived his claims that the services provided did not accommodate his disability and that DCS discriminated against him because of that disability. *See Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶¶ 13, 18 (App. 2014) (parent who believes services are inadequate must raise timely objection to permit juvenile court to address matter). Although we agree with DCS that Jose did not specifically assert below that the services were inappropriate because they did not accommodate his intellectual disability, we note that the fact of his disability was before the juvenile court and that he raised service-related claims. He requested more "hands[-]on" parenting time and that DCS investigate his friends, the Martinezes, to consider letting them assist him in caring for the children,[4] and also requested a written list of required services in Spanish. We thus generally address Jose's arguments regarding the appropriateness of the services provided.

¶7 A juvenile court may terminate a parent's rights pursuant to § 8-533(B)(8)(c) if it finds by clear and convincing evidence "[t]he child has been in an out-of-home placement for a cumulative total period of fifteen months or longer" and "the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future." Termination under any time-in-care ground in § 8-533(B)(8) requires that DCS "made a diligent effort to provide appropriate reunification services." DCS fulfills this duty by providing the parent "with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 37 (App. 1999). But DCS is not required to provide the parent with every conceivable service or to ensure that he participates in every

[4]When the juvenile court asked the case manager why she had not contacted the Martinezes to see if they could assist or support Jose, she responded, "I just forgot."

service offered. *In re Maricopa Cty. Juv. Action No. JS*-501904, 180 Ariz. 348, 353 (App. 1994).

¶8 In its ruling, the juvenile court determined that DCS had provided "appropriate reunification services" as to the time-in-care ground and found that although DCS had offered Jose services for three years, his progress had been "minimal" and providing further services would be futile. Viewed in the light most favorable to sustaining the court's order, there was ample evidence to support the court's findings. *See Manuel M.*, 218 Ariz. 205, ¶ 2. And, to the extent Jose asserts DCS's failure to increase his visits with the children or permit him to have unsupervised visits somehow demonstrated its failure to accommodate his intellectual disability, he simply has not established such a connection. Aside from asserting DCS failed to contact the Martinezes or provide him with more or unsupervised visits, Jose does not suggest what services DCS should have provided or explain why the services he received were insufficient. Rather, he contends, without factual support in the record, that DCS did not provide "necessary accommodations" to reunify the family and that it viewed him "as a poor, dumb, uneducated Mexican who doesn't deserve his children."[5]

¶9 The psychologist who evaluated Jose in 2016 testified that although he "very much wants to" be a part of his children's lives, his mental health disorders, including his "subnormal intellectual functioning" and a "Cluster C . . . personality disorder" prevented him from "adequately parenting [his] children," and that further "treatment services could be offered but this would prove futile." The clinical psychologist who performed the bonding assessment in 2016 opined she did not believe there were "[a]ny services that would have helped [Jose] that he did not participate in," or that there was "any service that [she] recommended that

[5]Jose provides no citation to the record or exhibits to support his repeated allegations of cultural and class bias by DCS, despite stating "[t]here is a strong sense from the records and trial exhibits" to support such claims. He also contends he preserved the issues he raises on appeal by contesting DCS's "case against him throughout the severance trial," and directs us to pages "5-176, 185-196" of the 207-page trial transcript to support his assertion. We advise counsel in the future to direct this court to specific portions of the record to support her arguments, and to refrain from making inflammatory, unsupported assertions. *See* Ariz. R. P. Juv. Ct. 106(A), Ariz. R. Civ. App. P. 13(a)(7)(B).

was not offered" to him. And, there was evidence that Jose did not accept the foster parents' offer of additional visits with the children.

¶10 Although Jose correctly asserts DCS did not provide him with a list in Spanish of the services he needed to complete, that fact does not establish that he did not understand his case plan or that DCS did not provide appropriate services to accommodate his needs. There was evidence that DCS repeatedly explained to Jose in Spanish what was expected of him, it provided him with his case plan in Spanish, which he signed, and he expressly acknowledged "he understood what [was] expected of him in order to get his children back." The DCS case manager testified that based on the frequent contact Jose had with her office, which occurred "every week for a while," she was confident he knew what services he had to complete. She also testified she had met with Jose in person "definitely over 20 times." Jose also testified that a Spanish-speaking assistant helped him communicate with the case worker when he visited the DCS office.

¶11 And, although Jose argues no additional services were offered after DCS withdrew its first motion to terminate, the case manager testified and the record shows that another parent aide referral and the psychological evaluation and bonding assessment took place during that time period. In addition, a May 2016 permanency planning report indicated that DCS had moved Jose's visits with the children to his home "to see how [he] does with [them] in a more routine home setting." That report also provided that although DCS had met with Jose a "number" of times with the assistance of a translator to discuss services and the reunification process, DCS still had concerns that Jose did not understand "the severity of the children's anxiety," that he had "no real plan how he [was] going to be able to parent the[] children," and that he "states he will just take care of things when they happen." The case manager similarly testified that "to this day [Jose] doesn't have a real plan on what he would do, how he would take care of the kids." Additionally, the portion of the bonding assessment report asking whether reunification services "should or should not be continued and why" states, "Family reunification services should not be continued. [The children] have been in care for over 2 and a half years. [Jose] does not take any responsibility for the reason why they came into care. He has not made any of the behavior changes needed to be able to reunify."

¶12 To the extent Jose asks us to reweigh any conflicting evidence and make credibility determinations, we do not do so. Rather, because the

juvenile court is the trier of fact, we regard that court as being "in the best position to weigh the evidence, observe the parties, judge the credibility of the witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). In summary, DCS provided multiple services throughout the dependency, and there was evidence that the services had been appropriate, that Jose understood what he had to do to obtain custody of his children, and that further services would be futile. For all of these reasons, we find no basis to disturb the court's finding that DCS had made a diligent effort to provide appropriate reunification services.

Best Interests

¶13 Jose suggests that if DCS had not "prolonged this case by dismissing the first termination motion to gather more evidence against him" and had instead promptly contacted the Martinezes, the juvenile court would not have found that termination was in the children's best interests. To establish that terminating Jose's parental rights is in the children's best interests, DCS was required to show they "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Oscar O.*, 209 Ariz. 332, ¶ 6. Here, the court found that termination would "further the plan of adoption, which would provide the children with permanency and stability."

¶14 There was ample evidence before the juvenile court that termination was in the children's best interests and that they are in an adoptive placement and are adoptable children. *See Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5 (App. 1998) (court may consider "the immediate availability of an adoptive placement" or "whether an existing placement is meeting the needs of the child" in support of best interests finding); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19 (App. 2004) (citation omitted) (best interests may be established by showing "a current adoptive plan exists for the child, or even that the child is adoptable"). There was evidence that the children suffer from anxiety and behavioral issues; the case manager opined that termination is in their best interests, noting that they would benefit from permanency to address those issues, and testified that they are in an adoptive home and are adoptable. The psychologist who performed the bonding assessment testified that because two of the children already have "emotional concerns and some behavioral problems," removing them from their current placement, where they have lived for three years, and placing them with Jose, would "intensify" their already-existing emotional and behavioral problems.

¶15 While we do not condone the case manager's failure to contact the Martinezes, we note that the juvenile court questioned Jose at the severance hearing about the Martinezes' relationship with the children.[6] In response to the court's questions, Jose testified that although the Martinezes were present "when [the children] were born . . . they haven't been able to see them anymore." The case manager similarly testified that the children do not know the Martinezes and added that she would be concerned about placing the children with strangers.

Disposition

¶16 The record contains reasonable evidence to support the juvenile court's finding that DCS provided Jose with appropriate reunification services, a requirement under the time-in-care ground, and that sufficient evidence supported the court's best interests finding. Therefore, we affirm the court's order terminating Jose's parental rights to V.M., V.-M., and C.M.

[6] On March 7, 2017, after the severance hearing, but before the juvenile court entered its under advisement ruling terminating Jose's parental rights, DCS submitted an addendum report stating that, after repeated attempts to contact the Martinezes following the severance hearing, the case manager had reached them and had run a background check. However, the results of that inquiry are not part of the record on appeal.