IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

A.G.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND SERGIO G.,
Appellees.

No. 2 CA-JV 2018-0026
Filed July 10, 2018

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NOT FOR PUBLICATION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. JD20150358
The Honorable Peter W. Hochuli, Judge

AFFIRMED

COUNSEL

Pima County Office of Children's Counsel, Tucson
By Sybil Clarke
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Michelle R. Nimmo, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

E C K E R S T R O M, Chief Judge:

¶1 In this ongoing dependency proceeding, A.G., a two-year-old dependent child, appeals from the juvenile court's denial of his petition to terminate the parental rights of his father, Sergio G. We affirm the court's order.

Factual and Procedural Background

¶2 A.G. was removed from his parents' custody shortly after he was born, and the Department of Child Safety (DCS) filed a "Dependency Petition and Petition for Paternity and/or Child Support," alleging his mother, Lorrinda L., who was a party to an ongoing dependency proceeding for another child, was unable to parent him because of substance abuse issues.[1] DCS alleged Sergio is A.G.'s father, having "established his paternity of [A.G.] by birth certificate," and had failed to protect him from Lorinda's substance abuse during her pregnancy. After a contested hearing in June 2016, the juvenile court found DCS's allegations had been proven and adjudicated A.G. dependent as to Sergio.

¶3 In June 2017, A.G. filed a motion to terminate Sergio's parental rights, alleging that (1) A.G. had been in court-ordered, out-of-home care for more than fifteen months, (2) Sergio had been unable to remedy the circumstances that caused that out-of-home placement, and (3) there is a substantial likelihood that Sergio will not be capable of exercising proper and effective parental care and control in the near future. *See* A.R.S. § 8-533(B)(8)(c). Notwithstanding the juvenile court's prior findings with respect to allegations in the dependency petition, A.G. also alleged termination was warranted under § 8-533(B)(6), a ground for termination when "the putative father failed to file a notice of claim of paternity as prescribed in [A.R.S.] § 8-106.01." According to A.G.'s motion, "The

[1]Lorrinda's parental rights to A.G. have been terminated, and she is not a party to this appeal.

father's name on the child's birth certificate is not sufficient pursuant to [§] 8-106.01."

¶4 After a contested termination hearing, the juvenile court concluded A.G. failed to establish either ground for termination. The court added that, "[a]lthough [it] has not found any ground for termination," it would nonetheless address best interests; it then stated, "The court cannot find by a preponderance of the evidence standard, that it is in the best interest of the minor to terminate the father's parental rights." Accordingly, the court denied A.G.'s termination motion, and this appeal followed.

Discussion

¶5 A.G. challenges the juvenile court's ruling that the evidence was insufficient to support either of the two grounds asserted or a finding of best interests. We review termination orders for an abuse of discretion, and we view the evidence in the light most favorable to sustaining the court's rulings. *Jade K. v. Loraine K.*, 240 Ariz. 414, ¶¶ 2, 6 (App. 2016). But we review the court's legal determinations de novo. *See Meryl R. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 24, ¶ 4 (App. 1999). A juvenile court may terminate a parent's rights if it finds clear and convincing evidence of one of the statutory grounds for termination and a preponderance of evidence that termination of the parent's rights is in the children's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). We will affirm an order in a termination proceeding unless we can say as a matter of law that no reasonable person could have reached the same result, in light of the applicable evidentiary standard. *Cf. Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10 (App. 2009) (affirming termination order).

Best Interests

¶6 In its answering brief, DCS correctly observes, "[I]f a party moving for termination of parental rights fails to meet its burden to prove that termination is in a child's best interests, that fact alone requires the juvenile court to deny the motion." *See*, *e.g.*, *In re Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) (stating, "[A]lthough the best interests of the child alone may not be sufficient to grant termination, they may be sufficient to deny termination"). Accordingly, DCS argues we "need not even address" A.G.'s arguments with respect to grounds for termination, and should affirm the juvenile court's order denying A.G.'s motion based solely on its finding of insufficient evidence to support best interests.

¶7 To a large extent, we agree with DCS that A.G. "essentially asks this Court to reweigh the evidence" as to best interests, which we will not do. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002). According to DCS, the juvenile court reasonably could have rejected some of the evidence A.G. relies upon, such as the testimony of Susan Brandt, a supervising social worker employed by the office of A.G.'s attorney, whose testimony was based solely on review of that attorney's file. For example, A.G. cites Brandt's opinion that A.G. would get "lost in the shuffle" if Sergio attempted to parent him in addition to the three grandchildren that he was already parenting. But, in contrast, the ongoing DCS case manager reported Sergio had completed many plan services while parenting the other children. Despite some concerns about his abilities to attend to all of the children, she said none rose "to the level of a safety concern." And, although the court acknowledged that removing A.G. from his placement with his great aunt could prove traumatic, DCS notes that, before any change in placement occurred, appropriate transition services could be provided through the continuing dependency. Thus, in contrast to A.G.'s assertion that "[t]here is no reasonable evidence in the record to sustain the trial court's determination that severance was not in [his] best interest," DCS argues, "[U]nder the applicable standard of review, it was not clearly erroneous for the juvenile court to conclude that A.G. had not shown a benefit of severance or a detriment of its denial that was" sufficient to warrant a finding that severance was in A.G.'s best interests.

¶8 As an initial matter, we are troubled by A.G.'s implicit suggestion that the juvenile court erred in "determining" that a denial of the severance motion "was in [his] best interest." It was A.G.'s burden to show severance was in his best interests, and the court simply found he failed to meet that burden. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004) ("[T]he party seeking termination bears the burden of persuasion."). Just as a criminal defendant is not required to prove his "innocence," *see*, *e.g.*, *Norton v. Superior Court*, 171 Ariz. 155, 157-58 (App. 1992), a parent is not required to prove his child's best interests are served by the denial of a severance motion. Nor is a juvenile court required to make findings when it denies a severance motion. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, ¶ 10 (App. 2010).

¶9 However, in these unusual circumstances, we do not believe we can resolve this appeal based solely on the juvenile court's ruling as to best interests, as DCS suggests, because A.G. not only challenges the court's assessment of the evidence, but the legal standard it employed. Generally, "a determination of the child's best interest" in support of a severance

"must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa Cty. No. JS-500274*, 167 Ariz. at 5. In this aspect of its ruling, the court stated it could not "find best interest just because another placement would be better for the child when there's a placement with a parent who can be a minimally adequate parent," noting that Sergio had parented his grandchildren for a period of years, and none had ever been removed from his care.

¶10 Arizona courts have recognized that, "[i]n most cases, the presence of a statutory ground" for termination "will have a negative effect" on a child that may be considered in the determination of best interests. *In re Maricopa Cty. Juv. Action No. JS-6831*, 155 Ariz. 556, 559 (App. 1988). Thus, "the focus shifts to the interests of the child[,] as distinct from those of the parent," only after "a court determines that a parent is unfit." *Kent K.*, 210 Ariz. 279, ¶ 31. Here, as the juvenile court's statements suggest, there was no such determination of unfitness, and, from a legal standpoint, Sergio is presumed to be an adequate parent. *See id.* ¶ 30 ("[A]t the outset of a termination proceeding, parent and child 'share a vital interest in preventing erroneous termination of their natural relationship.'"), *quoting Santosky v. Kramer*, 455 U.S. 745, 760 (1982). We find no error or abuse of discretion in the court's ruling as to best interests, but, because it appears closely related to its determination that A.G. failed to prove either statutory ground alleged, we address those aspects of the court's ruling as well, despite DCS's suggestion that we need not do so.

Time-in-Care Ground

¶11 We find no abuse of discretion with respect to the juvenile court's determination that A.G. failed to prove "a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future," as required to warrant termination pursuant to § 8-533(B)(8)(c). As A.G. acknowledges, evidence established Sergio was already parenting his grandchildren, and both Sergio and the DCS case manager testified he could be available to parent A.G. in as little as two months. A.G. cites no authority for his assertion that "the month to two months contemplated" by these witnesses "cannot be within the 'near future' requirement of A.R.S. 8-533(B)(8)(c)" in light of A.G.'s age. We are unpersuaded that, as a matter of law, no reasonable person could have failed to find clear and convincing evidence that Sergio was likely to be incapable of parenting in the near future.

Putative Father's Registry

¶12 A.G. also challenges the juvenile court's denial of his claim that Sergio was subject to termination pursuant to § 8-533(B)(6), which provides a ground for termination when a "putative father failed to file a notice of claim of paternity as prescribed in § 8-106.01." As A.G. observes, our supreme court has defined a "putative father" as "a man who is or claims to be the father of the child and whose paternity has not been established." *David C. v. Alexis S.*, 240 Ariz. 53, ¶ 17 (2016). In denying A.G.'s claim for termination on this ground, the court noted that in adjudicating A.G. dependent, it found DCS had proven all allegations in its petition for a determination of dependency and paternity, including the allegation that Sergio's paternity had been established by A.G.'s birth certificate. *See* A.R.S. § 25-814(A)(3) ("A man is presumed to be the father of the child if: . . . . [a] birth certificate is signed by the mother and father of a child born out of wedlock."). As his sole challenge to the court's denial of termination on this ground, A.G. now argues that finding was erroneous, and that § 8-533(B)(6) therefore applies, because "[u]nder A.R.S. [§] 25-814(A)(3), [Sergio's] name on [A.G.'s] birth certificate does no more than establish a presumption of paternity."

¶13 We do not disagree that the presumptions of paternity found in § 25-814 are subject to challenge; the statute itself provides the presumptions may "be rebutted by clear and convincing evidence." § 25-814(C). But an unchallenged petition for paternity, such as the one filed by DCS in this case, may be granted by an admission by the presumptive father or by default. *See* A.R.S. § 25-806(D). We see no evidence that A.G. challenged the issue of Sergio's paternity during proceedings on DCS's dependency and paternity petition. More importantly, A.G. did not appeal from the adjudication in those proceedings. *See, e.g., Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 4 (App. 2000) ("[o]rders declaring a child dependent" "are final, appealable orders"). Absent "a timely notice of appeal following entry of the order sought to be appealed, we are without jurisdiction to determine the propriety of the order sought to be appealed." *Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982). Thus, we will not consider a collateral attack on the court's judgment of paternity as a basis to overturn its denial of A.G.'s petition to terminate Sergio's parental rights.

Disposition

¶14 We affirm the juvenile court's order denying A.G.'s petition to terminate Sergio's parental rights.