IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SEAN H.,
Appellant,

v.

MINDY R. AND R.H.,
Appellees.

No. 2 CA-JV 2019-0177
Filed March 23, 2020

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NOT FOR PUBLICATION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 Graham County
No. SV201900011
The Honorable Travis W. Ragland, Judge Pro Tempore

AFFIRMED

COUNSEL

E.M. Hale Law, Lakeside
By Elizabeth M. Hale
Counsel for Appellant

Law Office of Jeremy J. Waite P.C., Safford
By Jeremy J. Waite
Counsel for Appellee

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Sean H. appeals from the juvenile court's order terminating his parental rights to his son, R.H., born in November 2017, pursuant to a private petition filed by the mother, Mindy R. Sean argues the court erred in determining severance of his rights was supported by sufficient evidence of abandonment, *see* A.R.S. § 8-533(B)(1), and was in R.H.'s best interests. We affirm.

¶2 A juvenile court may terminate a parent's rights only if it finds by clear and convincing evidence that a statutory ground for severance exists, and finds by a preponderance of the evidence that severance is in the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). On review, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002).

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12 (App. 2007). Evidence presented at the severance hearing established that Sean used illegal drugs, including marijuana, methamphetamine and OxyContin, both before and after R.H. was born.[1] When R.H. was a few months old, the parties stipulated that Mindy would have sole legal decision-making and discretion over Sean's visits with their son. Sean, who had been employed as a high school football coach, testified that Mindy had "blackmailed" him to agree to sole custody by threatening

[1] When Mindy had difficulty reaching Sean during the first six months of R.H.'s life, she would find him at local "drug houses." Sean's former co-worker, who taught with him at Thatcher High School, testified that she had observed Sean in the high school weight room "nodding off [and s]ometimes incoherent, not able to understand what he was saying to [her] and to the students."

to share a video of him in the Thatcher High School gym "nodding in and out while standing up" due to drug use; the video was admitted at the severance hearing. Mindy denied that she had threatened to use the video to blackmail Sean, and instead testified she had filmed Sean because she "wanted to show him one day that he needed to get help."[2]

¶4 Sean saw R.H. less than ten times during the first six months of his life, and approximately four or five times during the following six months, with each visit lasting at most forty-five to sixty minutes; he also saw R.H. "one or two times" from the time he was twelve to eighteen months old. Mindy testified she did not deny Sean visits with R.H. during the first six months of his life. However, based on safety concerns related to Sean's ongoing drug use, once R.H. turned one, Mindy requested Sean pass a drug test before he could visit his son.[3] Sean "kind of disappeared" after that. Although Sean paid child support at various times during R.H.'s life, he did not pay any support during the three months before the termination hearing. And although Sean purchased some gifts for R.H., he only received one of them.[4]

¶5 In May 2019, when R.H. was eighteen months old, Mindy filed a petition to terminate Sean's parental rights on the ground of abandonment. *See* A.R.S. § 8-533(B)(1). At the September 2019 termination hearing, Mindy testified she had not heard from Sean since an unplanned encounter in July 2019. After the hearing, the juvenile court terminated Sean's rights to R.H. based on abandonment and found termination was in his best interests. This appeal followed.

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[2]Mindy also testified that when R.H. was very small, Sean "would nod in and out a lot just while he was holding the baby."

[3]Mindy acknowledged she denied Sean visits with R.H. three or four times from the time he was twelve to eighteen months old. She also acknowledged she had "offered to pay for a drug test" for Sean.

[4]Sean gave R.H. a basketball, and purchased other gifts during a family vacation with his former wife (not Mindy) and his two children from his marriage; Mindy refused to accept the other gifts. Sean also purchased holiday gifts which were never delivered to R.H. and birthday gifts which he maintained Mindy would not let him give to his son.

¶6 Pursuant to § 8-533(B)(1), termination of parental rights is warranted if "the parent has abandoned the child." Section 8-531(1), A.R.S., defines abandonment as:

> the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

¶7 "[A]bandonment is measured not by a parent's subjective intent, but by the parent's conduct." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 18 (2000). "The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity." *Id.* ¶ 25. "The concept of abandonment and terms such as 'reasonable support' or 'normal parental relationship' are somewhat imprecise and elastic. Therefore, questions of abandonment . . . are questions of fact for resolution by the [juvenile] court." *In re Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4 (1990).

¶8 In its ruling terminating Sean's parental rights to R.H., the juvenile court found Mindy established Sean had abandoned R.H. for the following reasons: he had "little to no contact" with R.H. in nearly a year; although Mindy had denied him parenting time "on a few occasions . . . due to her concern over his substance abuse," Sean had stopped trying to get parenting time because Mindy was asking him to submit to drug tests; Sean "did not provide reasonable support for [R.H.], financial, emotional, or otherwise"; and, Sean did not regularly send R.H. gifts, presents or letters. The court further concluded Sean had not made "even minimal efforts to support and communicate with [R.H.]," and he had "not maintained regular contact with [R.H.], nor provided normal supervision."

¶9 The juvenile court noted that although Sean was aware of the court process, he did not avail himself of it, nor did he "assert his legal rights vigorously and to the extent necessary." The court determined that no just cause existed for Sean's failure to have maintained a normal parental relationship with his son. In support of its best-interests finding, the court

found R.H. is adoptable; severance "would provide certainty and stability" for him; Sean's presence is a detriment to R.H. because of his ongoing substance abuse problem; and Mindy's concerns about "what would happen" to R.H. if she were not able to care for him were "legitimate."

¶10 On appeal, Sean argues there was insufficient evidence to support the juvenile court's ruling based on abandonment.[5] Citing this court's decision in *Calvin B. v. Brittany B.*, 232 Ariz. 292, ¶ 1 (App. 2013), and relying primarily on his own testimony, Sean argues the termination order should be reversed because Mindy's repeated attempts to thwart his visits with R.H. constituted just cause which prevented him from maintaining a normal parental relationship with his son. He asserts that Mindy's insistence that he take drug tests before seeing R.H., without providing details as to how he could accomplish that task, was "just another ruse . . . to prevent him from seeing" his son. He also points out that Mindy failed "to present any evidence of a time when Sean was around R.H. where he passed out or was incoherent." He further argues Mindy prevented him from giving R.H. gifts he had purchased for him.

¶11 Based on the record, we are not persuaded by Sean's repeated assertions that Mindy was responsible for his limited contact with and support of R.H.[6] In *Calvin B.*, this court stated, "[A] parent who has persistently and substantially restricted the other parent's interaction with their child may not prove abandonment based on evidence that the other has had only limited involvement with the child." *Id.* But in that case, we found the juvenile court's findings had "disregard[ed]" evidence that the father had repeatedly sought enforcement of his visitation rights and had "successfully petitioned the court to hold [the mother] in contempt for not allowing him the visitation granted by prior order." *Id.* ¶¶ 28-29. We

[5]Although Sean notes that the juvenile court did not cite "to any statutes" in its ruling, he nonetheless asserts the court terminated his parental rights pursuant to § 8-533(B)(1). In any event, the court expressly stated its ruling was based on abandonment, the sole ground raised in Mindy's petition. To the extent Sean intended to raise the court's failure to cite the relevant statute in its ruling as an argument on appeal, because he has not adequately developed it, we do not address it further. *See City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 88 (App. 2008) (argument on appeal waived by party's failure to adequately develop it).

[6]We note that Sean does not appear to challenge on appeal the actual number of times he has seen R.H., just the reason for the number of visits.

concluded that, in contrast to the father in *Michael J.*, "Calvin [had] 'vigorously assert[ed] his legal rights' to see his son." *Id.* ¶ 29 (quoting *Michael J.*, 196 Ariz. 246, ¶ 22 (second alteration in *Calvin B.*)).

¶12 Sean did not make the same showing here. In fact, he testified that when Mindy told him to stop sending her text messages he thought, "So you can only beat your head into a brick wall so many times to where you get discouraged and . . . you don't text and you don't try . . . for a few months and things." He added, "I always wanted to [see R.H.], but I knew I was never going to be allowed to." Similarly, Sean also acknowledged that although he thought his child support obligation was too high, he never asked for a reduction, instead choosing not to make all the required payments. Moreover, Sean has not established, nor would the record support a finding that Mindy "persistently and substantially" restricted his contact with R.H. *Id.* ¶ 1. To the contrary, Mindy established that she asked Sean to take drug tests before visiting R.H. because of her concerns for R.H.'s safety based on Sean's behavior while under the influence of drugs, in addition to the dangers related to his possession of drug paraphernalia and past instances when he had drug residue on his hands.

¶13 In an apparent attempt to support his arguments on appeal, Sean points to conflicts in the testimony on a variety of topics, including his purported attempts to provide gifts to R.H., the reason he stipulated to give Mindy sole custody, his conduct while under the influence of drugs, and Mindy's alleged threats to publicize the video. But Sean essentially asks this court to reweigh the evidence, which we will not do. *See Jesus M.*, 203 Ariz. 278, ¶ 12. Instead, we defer to the juvenile court, which is "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). This is especially true in the case of abandonment, which necessarily involves facts best resolved by the juvenile court. *See Maricopa Cty. No. JS-500274*, 167 Ariz. at 4. The abandonment 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. §§ 8-533(B)(1), 8-531(1). Here, the court found Sean had not satisfied any of these conditions, a finding supported by the evidence presented.

¶14 Sean also asserts the juvenile court erred in finding termination was in R.H.'s best interests. He points out that no adoptive father is waiting for R.H. and further argues that severance does not create

a benefit to his son, while maintaining his parental relationship does not present a detriment to him. He also argues that, "[w]hile [his] drug use is definitely a concern, no credible evidence was presented that [he] had been a threat to his child or had harmed [him] during the times he was allowed to see him."

¶15 A best-interests finding may be "based on either a benefit to the child from severance or some harm to the child if severance is denied." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 16 (2016). The record amply supports the juvenile court's conclusion that severance was in R.H.'s best interests. The court found that severance would provide R.H. the certainty and stability that had been lacking in his life because of Sean's admitted substance abuse problem, which the court characterized as a "detrimental presence" in R.H.'s life. And although Sean correctly points out that no adoptive father is present, the fact of R.H.'s adoptability becomes relevant when viewed in the context of Mindy's concern about R.H.'s future care if something were to happen to her, a factor the court expressly considered in its best-interests finding. Finally, to the extent Sean suggests termination was inappropriate because R.H. had not actually been harmed in his presence, based on the evidence of Sean's conduct while under the influence, we reject the suggestion that the court needed evidence of an actual injury to rule as it did.

¶16 Accordingly, we affirm the juvenile court's order terminating Sean's parental rights to R.H.