IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CHRISTOPHER M.,
Appellant,

v.

AUBREY R. AND M.R.,
Appellees.

No. 2 CA-JV 2021-0122
Filed January 10, 2022

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NOT FOR PUBLICATION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. S20200150
The Honorable Peter W. Hochuli, Judge

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

Randle Palmer & Bernays PLLC, Tucson
By Uri G. Palmer
Counsel for Appellee Aubrey R.

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By David Miller
Counsel for Minor

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Christopher M., father of M.R., born in February 2017, appeals from the juvenile court's order granting the petition for termination of parental rights filed by Aubrey R., M.R.'s mother, based on the ground of abandonment. *See* A.R.S. § 8-533(B)(1). Christopher argues the court abused its discretion by finding termination was warranted on that ground and was in M.R.'s best interests. We affirm.

¶2 Before the juvenile court may terminate a parent's rights, it must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). "[W]e will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18 (App. 2009). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10 (App. 2009). We view the facts in the light most favorable to sustaining the juvenile court's findings. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 2 (2016).

¶3 Between February 2017, when she was born, and November 2017, Christopher visited M.R. one to three times per week. Christopher testified at the termination hearing that in November 2017 he "left town" for a week "in a hurry" following an argument with his mother without taking his wallet or telephone, and without telling Aubrey he was leaving. When he returned, Aubrey had "sold all [his] stuff, or donated it, and moved."

¶4 Christopher saw M.R. two to three times per week from December 2017 through June 2018. He failed to attend a hearing on Aubrey's petition to establish paternity, legal decision-making, parenting time, and child support in June 2018, at which the juvenile court entered a default order permitting him to see M.R. three hours per week, supervised by Aubrey.[1] In September 2018, the court ordered Christopher to pay for M.R.'s health insurance; Aubrey did not request child support. Christopher did not respond to Aubrey's request to see M.R. for Christmas in 2018, and did not contact Aubrey until February 2019.

¶5 At the time of the severance hearing in August 2021, Christopher had visited M.R. regularly between February and May 2019, but stopped showing up for visits in May of that year. Although he sent Aubrey a text message in July 2019, wishing her a happy Fourth of July, he did not attempt to set up a visit with M.R. Aubrey did not hear from Christopher until February 2020, when he began calling her.[2] And Christopher never introduced M.R. to his three other children.[3]

¶6 In October 2020, Aubrey filed a petition to terminate Christopher's parental rights, alleging he had abandoned M.R., whom he had not seen in more than a year or spoken with in over nine months, and

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[1]Christopher testified he "marked [the hearing date] on the calendar wrong," and that he did not think he needed to file a response to Aubrey's special paternity complaint. He also testified that because Aubrey moved without providing him with her new address, he was unable to visit M.R. after the parenting-time orders were entered.

[2]At the severance hearing, Christopher testified that other than a single letter he sent to M.R. in July 2021 and an email he sent to Aubrey regarding insurance information, he had not sent any other letters, emails or text messages to Aubrey since May 2019. He also testified he had attempted to reach Aubrey by telephone, although there is conflicting testimony, including Christopher's own inconsistent statements, whether he left messages when he called her. Aubrey testified she did not answer his telephone calls.

[3]Christopher's other children were seventeen, fifteen and twelve years old at the time of the severance hearing. He testified he had been able to successfully co-parent those children with their mothers.

he had not exercised his court-ordered parenting time with her.[4] *See* § 8-533(B)(1). The juvenile court ordered Aubrey to set up a social study pursuant to A.R.S. § 8-536.

¶7 Carmen Juarez, the author of the social study, concluded that Christopher had abandoned M.R. and that she would benefit from adoption by her stepfather, Daniel. However, Juarez determined that severance was not in M.R.'s best interests because she would benefit from knowing Christopher, who is motivated to be her father, is a positive role model, has no substance abuse history, has a stable lifestyle, and is actively involved with his other children.[5] Juarez testified at the severance hearing that M.R. would benefit from developing a relationship with her three half-siblings. She also opined that M.R. could benefit from having two father figures in her life, which would not be detrimental to her. And, although Juarez testified that Aubrey "could have put some effort" into arranging visitation with Christopher, she also stated "both parents had that responsibility." She added that she did not know "which parent is being honest" and that Christopher had been "remiss" in failing to file to modify or enforce his parenting time.

¶8 At the end of September 2021, following the severance hearing in August, the juvenile court entered an under-advisement order terminating Christopher's parental rights to M.R. The court's findings included that he had "failed to maintain a normal parental relationship with [M.R.] without just cause for a period of six months or longer," and that he had made "less than minimal efforts to support and communicate with her." The court also found termination was in M.R.'s best interests, noting that M.R. "sees [Daniel] as her father" and that he wished to adopt her.

¶9 A parent abandons a child by failing "to provide reasonable support and to maintain regular contact with the child, including providing normal supervision." A.R.S. § 8-531(1). Abandonment "includes a judicial

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[4]In May 2021, more than six months after Aubrey filed the petition to terminate Christopher's parental rights, Christopher filed a request to enforce the terms of the court-ordered parenting time order entered in June 2018.

[5]Counsel for M.R., who did not file a brief on appeal, agreed in her closing argument at the severance hearing that severance was not in M.R.'s best interests.

finding that a parent has made only minimal efforts to support and communicate with the child." *Id.* "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." *Id.* "[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), and "depend[s] on the circumstances of the particular case," *Kenneth B. v. Tina B.*, 226 Ariz. 33, ¶ 19 (App. 2010).

¶10 On appeal, Christopher first contends the juvenile court abused its discretion by finding he had abandoned M.R., asserting his "principal offense is that he was not instinctively drawn to protracted litigation like Aubrey was." Citing *Calvin B. v. Brittany B.*, 232 Ariz. 292 (App. 2013), Christopher argues Aubrey denied him visitation with M.R. *See id.* ¶ 21 ("A parent may not restrict the other parent from interacting with their child and then petition to terminate the latter's rights for abandonment."). Christopher asserts that "overwhelming evidence pointed to an inexorable conclusion: Aubrey prevented [him] from seeing M.R. and then made an unsupportable claim of abandonment." He maintains the court erred by focusing on "isolated facts" rather than "the big picture."[6]

¶11 Christopher criticizes the juvenile court for failing to cite *Calvin B.*, much less distinguish it, noting that he mentioned it in his opening statement and closing argument. He maintains *Calvin B.* "is on all fours" with his case, despite the fact that trial counsel asserted below that although *Calvin B.* is analogous to the instant case, it is "obviously

[6]In what appears to be a partial mischaracterization of the testimony, Christopher asserts, without citation to the record, that Juarez stated Aubrey "was the reason why [he] was not getting opportunities to see his child and that the only impediment to reunification was Aubrey's refusal to cooperate in such a process." However, upon closer examination of the testimony Christopher appears to rely on, when asked if there were barriers to Christopher *continuing* his relationship with M.R., Juarez stated the "only barrier" she could see was Aubrey, who "is going to strongly resist any relationship" between M.R. and her father. However, Juarez did not expressly state Aubrey was the reason he had not been able to see M.R. in the past. In fact, as Christopher acknowledges in his opening brief, Juarez testified that "both parents" bear responsibility for the lack of contact between Christopher and M.R.

different." In *Calvin B.*, we held "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.* ¶ 1. But the facts in *Calvin B.* are readily distinguishable. There, the father made efforts to maintain a parental relationship over a course of years and attempted to make use of the limited visitation the mother allowed before she petitioned to terminate his parental rights. *Id.* ¶¶ 2-8, 22-24. Ultimately, the mother was found to have violated a parenting-time order by refusing to allow any contact between the father and son. *Id.* ¶ 24. On appeal, this court determined that despite these obstacles, Calvin had "vigorously assert[ed] his legal rights" to see his son over a course of years. *Id.* ¶ 29 (alteration in *Calvin B.*) (quoting *Michael J.*, 196 Ariz. 246, ¶ 22); *see also Michael J.*, 196 Ariz. 246, ¶ 22 (when circumstances prevent traditional bonding with child, father "must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary" to avoid termination based on abandonment (quoting *In re Pima Cnty. Juv. Action No. S-114487*, 179 Ariz. 86, 97 (1994))).

¶12 In contrast, here the juvenile court found Christopher had failed to appear at the June 2018 hearing at which the court had awarded Christopher parenting time and he had not consistently exercised his parenting time thereafter. Since May 2019, he had sent only one letter and one email, and he had not seen M.R. or sent any birthday or holiday gifts. Additionally, the court noted that Christopher had taken no action to enforce his parenting-time rights until two years after he had last seen M.R. and almost six months after being served with the petition to terminate his rights. In sum, the court characterized the attempts Christopher had made over the last two years as "less than minimal," and his recent filing to enforce parenting time as "[t]oo little too late."

¶13 Other than challenging the juvenile court's finding that he had abandoned M.R., Christopher does not meaningfully dispute the remaining findings of fact that support the court's ruling. The evidence showed that between May 2019 and February 2020, Christopher made no effort to exercise his parenting time, without any interference from Aubrey. Moreover, Christopher conceded that although he did not think having Aubrey supervise his visits with M.R. was a good idea, he did not file a request to modify the parenting-time order, even though he had "filled" out the papers to do so. He also acknowledged it was a "mistake" to let so much time lapse without seeing M.R. and without filing anything to enforce the parenting-time order, a sentiment Juarez echoed. He further testified

he had not sent M.R. any birthday or holiday gifts in the last few years. Notably, when the court directly questioned Christopher, he acknowledged it had taken him fourteen to fifteen months to obtain paperwork to modify his parenting time, and further acknowledged that even when he knew telephone conversations with Aubrey "weren't working," he did not attempt to send her text messages or emails. Christopher has not established the court abused its discretion in finding he abandoned M.R.

¶14 Christopher next argues the juvenile court abused its discretion by finding termination was in M.R.'s best interests. As our supreme court has directed, when determining best interests, "we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶ 12 (2018) (quoting *Kent K.*, 210 Ariz. 279, ¶ 35). "The 'child's interest in stability and security' must be the court's primary concern." *Id.* (quoting *Demetrius* L., 239 Ariz. 1, ¶ 15). And, "termination is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* ¶ 13.

¶15 Christopher argues that although M.R. has a stable home with Aubrey and Daniel, who wants to adopt her, Juarez nonetheless testified that severance and adoption were not in M.R.'s best interests. He points out that he has maintained positive relationships with the mothers of his other children, and that he is "willing to do the same with Aubrey if she would work with him." He maintains the juvenile court improperly concluded that a finding of abandonment "equated" with a best-interests finding, and contends the court's assertion that he "walked out of M.R.'s life in November 2017 [is] patently untrue," since he returned one week later. He asserts the court's rejection of Juarez's opinion is based on its "dislike" of his conduct in November 2017, rather than M.R.'s best interests, specifically arguing "it is not clear" the court was permitted to reject Juarez's opinion pursuant to § 8-536(A), which requires the court to order a social study upon the filing of petition to terminate parental rights.

¶16 The juvenile court "strongly disagree[d]" with Juarez's opinion that severance was not in M.R.'s best interests, instead finding that termination *was* in her best interests for several reasons, including:

> The Court agrees [M.R.] would benefit from having a father in her life but in this case, Father has not acted in the role. . . . [A]s to

> [M.R.], he has demonstrated she wasn't important enough to tell people about[,] much less remain active in her life.
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> In November 2017 he chose to suddenly disappear out of her life with no explanation to Mother. When he resurfaced, he didn't file paperwork in court to be declared her father or establish parenting time, Mother did. When he stopped seeing [M.R.] in May 2019, he thought about filing paperwork in court to change/enforce his parenting time. He thought about it for eighteen (18) months and was allegedly filling out or reviewing the paperwork on the night he was served with the Termination action, November 30, 2020. Then he apparently thought about it for another six (6) months because he did not file the paperwork until May 26, 2021. . . .
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> It has been a detriment to [M.R.] to have Father be in her life, leave with no explanation, slowly start working his way back into her life, then leave again with no explanation and show no interest for over two (2) years to establish and demand his right to spend time with her. . . . It would be a detriment to [M.R.] to make her remain in limbo, to wait and see if Father would actually move forward to establish parenting time, participate consistently, not disappear if it didn't fit his schedule or life got in his way, and remain in [M.R.'s] life.

¶17 To the extent Christopher suggests the juvenile court's best-interests ruling was based on "whim" and lacked a "minimum threshold" of information to support its findings, the record belies his claims. Insofar as Christopher also asserts the court "ignored all evidence" showing that termination was not in M.R.'s best interests, and that "the only barrier to reunification" was Aubrey, he is essentially asking this court to reweigh the evidence and second guess the court with respect to its

resolution of conflicts in the evidence.[7] This we will not do. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004).

¶18 We acknowledge § 8-536(A) requires a social study that includes a recommendation whether the parent-child relationship should be terminated. That recommendation should be highly relevant to the juvenile court's decision, particularly in a private termination proceeding where the court does not have the benefit of other evidence typically submitted in termination proceedings filed by the Department of Child Safety. Nonetheless, the court was not required to adopt that recommendation. *See Alexander M. v. Abrams*, 235 Ariz. 104, ¶ 19 (2014) (juvenile court may not impermissibly delegate duty to independently determine whether reunification of dependent children with parents is in children's best interests); *see also DePasquale v. Superior Court,* 181 Ariz. 333, 336 (App. 1995) (trial court must not "abdicate its responsibility to exercise independent judgment"); *In re Pima Cnty. Juv. Action No. S-139*, 27 Ariz. App. 424, 427 (1976) (sufficiency of observations made by author of social study "merely affected the weight to be given her opinion").

¶19 Notably, the juvenile court made clear in its ruling that it was not relying on a single incident, but instead, on Christopher's conduct over time. The court was entitled to rely on the other evidence provided by the parties. This included Aubrey's testimony that if the court did not grant her motion, she "worried about [M.R.] getting older and building a relationship with somebody who has already twice so willingly just walked out of her life without a word, without any interest as to how she's doing." "[J]udging the credibility of witnesses and resolving conflicts in testimony are uniquely the province of the trial court." *In re David H.*, 192 Ariz. 459, ¶ 8 (App. 1998). The court also found that Daniel was willing to adopt M.R., a factor favoring a finding of best interests. *See Demetrius L.*, 239 Ariz. 1, ¶ 1. "A best-interests determination need only be supported by a preponderance of the evidence." *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 15 (App. 2008). Contrary to Christopher's assertion, there is ample evidence in the record supporting the court's best-interests finding here.[8]

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[7] In his closing argument, Christopher's attorney acknowledged "there's a lot of facts in dispute."

[8] In addition, we reject Christopher's argument that the social study requirement in severance cases is comparable to the requirement for expert

¶20 Finally, Aubrey requests an award of attorney fees and costs. We agree with Christopher that there is no basis for such an award here. We therefore deny her request.

¶21 For all of these reasons, we affirm the juvenile court's order terminating Christopher's parental rights to M.R.

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testimony regarding the standard of care in medical malpractice cases. *See Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160, ¶ 12 (2017) ("Unless malpractice is grossly apparent, the standard of care must be established by expert medical testimony."). *Compare* § 8-536(A) (upon filing of petition to terminate parental rights, court shall order social study be conducted by "department, an agency or another person selected by the court"), *and* § 8-536(C) (permitting court to waive social study requirement if it finds "that to do so is in the best interest of the child"), *with* A.R.S. § 12-2604 (setting forth strict requirements for individual testifying as expert in medical malpractice cases).