FILED BY CLERK
DEC 14 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ERIC H., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, KAMARIA S., ZINAYAH S., and CHRISTIAN S., Appellees.	2 CA-JV 2009-0093 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18556200

Honorable Karen S. Adam, Judge Pro Tempore

AFFIRMED

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo
Tucson
Attorneys for Appellee Arizona Department of Economic Security

---

E C K E R S T R O M, Presiding Judge.

¶1 Eric H. appeals from the juvenile court's order of July 29, 2009, terminating his parental rights to seven-year-old Kamaria S., five-year-old Zinayah S., and almost two-year-old Christian S. The court found the evidence warranted termination under the alleged grounds of abandonment, A.R.S. § 8-533(B)(1), neglect or abuse, § 8-533(B)(2), and length of time in care, § 8-533(B)(8)(a) (nine months or longer). It also found termination to be in the children's best interests. We affirm.

¶2 We view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining an order terminating parental rights. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 13, 53 P.3d 203, 207 (App. 2002). So viewed, the evidence established that Child Protective Services (CPS) first came into contact with Eric's children in late October 2007, after it had received information that the children were being neglected by their mother, Felicia S.[1] Upon interviewing Felicia and observing the children, CPS investigator Jason Frazier found no evidence to support the allegation. Felicia told him Eric was the father of some of her children, but she did not know where he was and he "did not have anything to do with the children." In January 2008, CPS received two "status communications" about Felicia from the Tucson Police Department. The first stated Felicia had reported Eric and his girlfriend, Angela G., had broken into her house and assaulted her

[1] Felicia relinquished her parental rights to the children, and her parental rights were terminated on that ground. *See* A.R.S. § 8-533(B)(7).

in December 2007, and she believed the attack had been motivated by testimony she was expected to provide in a pending domestic violence case against Eric. The second communication informed CPS of Felicia's report that she had helped Eric dispose of Angela's murdered body in January 2008 by buying cleaning supplies, helping to clean his apartment, and packaging the body. Felicia had further told the police she and Eric had taken the body to the desert, where they burned and buried it. Eric was indicted on first-degree murder charges on January 22, 2008, and was still in custody awaiting trial when his parental rights were terminated.

¶3 After receiving these communications, Frazier telephoned Felicia to determine whether the children were safe, but Felicia refused to disclose where she and the children were. CPS later learned Felicia had taken the children to Texas. In February 2008, the Arizona Department of Economic Security (ADES) filed a petition alleging all four of Felicia's children were dependent. CPS workers retrieved the children from Texas and returned them to Arizona, where they were placed in ADES's custody.

¶4 Frazier interviewed Eric in the Pima County Jail on February 21, 2008, provided him with CPS contact information, and notified him of the upcoming preliminary protective hearing. At that hearing, Eric entered a denial to the dependency allegations and submitted the issue on the evidence in the record. The juvenile court adjudicated the children dependent as to Eric on February 26, 2008. The court also found Eric was "unable to take advantage of the services offered in the case plan because of his current status at the Pima

County jail" but noted, "If [Eric]'s status changes while he is at the Pima County jail, there may be things that he can do [to facilitate reunification] while in custody."

¶5 In March 2008, ongoing case manager Andria Ayon assumed responsibility for the case, which she retained through the contested termination hearing in July 2009. She testified at the termination hearing that, within a week of her assignment to the case, she had mailed Eric a letter introducing herself and providing her contact information, which included the same general CPS telephone number Frazier had given him. In October 2008 and April 2009, Ayon also mailed Eric copies of the case plan. According to Ayon, throughout the pendency of the case, Eric never contacted her. Nor did he send any letters or cards to be forwarded to the children. And, although the juvenile court apparently ordered Eric transported from the jail to attend hearings whenever his attorney requested, he did not appear at the dependency disposition hearing or dependency review hearings held in June, July, and October 2008.[2] Thus, after his first appearance at the preliminary protective hearing in February 2008, Eric did not appear in court again until the permanency hearing began in February 2009.

¶6 After hearing testimony, the juvenile court continued the February permanency hearing until March 23, 2009, and waived Eric's presence on that date. At the continued hearing, the court found the children "cannot be returned to a parent without a substantial risk

[2]At the July 2008 dependency review hearing, the juvenile court found Eric had "declined to come to court."

of harm to [their] physical, mental, or emotional health or safety" and ordered the case plan goal changed to severance and adoption. The court also ordered ADES to file a motion to terminate parental rights. In its motion, ADES alleged Eric had abandoned the children, had abused or neglected them, and had substantially neglected or wilfully refused to remedy the circumstances that caused them to remain in out-of-home placements for nine months or longer. After a contested termination hearing on July 20, 2009, the court granted termination on all grounds alleged.

¶7 On appeal, Eric argues ADES failed to make a good faith effort to preserve his family, in violation of his constitutional right to substantive due process. Relying on *Mary Lou C. v. Arizona Department of Economic Security*, 207 Ariz. 43, 83 P.3d 43 (App. 2004), and *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), Eric contends ADES had a constitutional obligation to make its "best efforts to preserve the family [that] applies to grounds for termination across the board" and had failed to make such efforts in this case. He argues neither Frazier nor Ayon had done anything "to facilitate contact with his children or assist him in participating in case plan services." Specifically, he asserts CPS made no "effort[s] to establish supervised or therapeutic visits" with his children at the jail and failed to investigate reunification services that might be available to him while he was in custody.

¶8 In response, ADES disputes both Eric's conclusion that it was constitutionally required to make its "best efforts" to reunify his family and his suggestion that its

reunification efforts had been insufficient.[3] ADES notes that, in *Toni W. v. Arizona Department of Economic Security*, 196 Ariz. 61, ¶¶ 14-15, 993 P.2d 462, 466-67 (App. 1999), Division One of this court held ADES was not required to provide reunification services before seeking to terminate the parental rights of a mother who had abandoned her child at birth. ADES also argues it had made reasonable efforts to inform Eric of the proceedings and the case plan tasks designed to facilitate reunification; it asserts it could do "little more to assist [him] in the absence of any demonstration . . . that he was interested in participating in any meaningful way in the dependency."

¶9 On review of a termination order, "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.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. 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. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). We review constitutional issues de novo. *In re Andrew C.*, 215 Ariz. 366, ¶ 6, 160 P.3d 687, 688 (App. 2007).

---

[3]Although *Mary Lou C.* holds ADES generally has a constitutional obligation to "make an effort to preserve the family" before seeking termination of a parent's rights, neither that case nor *Mary Ellen C.* requires ADES to exercise its "best efforts" in this regard. *Mary Lou C.*, 207 Ariz. 43, ¶ 15, 83 P.3d at 49; *see also Mary Ellen C.*, 193 Ariz. 185, ¶¶ 33-34, 971 P.2d at 1053.

¶10 As ADES points out, the juvenile court's written ruling contains no express findings that ADES made reasonable or diligent efforts to provide appropriate reunification services. But we nonetheless presume the court made every finding necessary to support its judgment. *See Mary Lou C.*, 207 Ariz. 43, ¶ 17, 83 P.3d at 50. We agree with ADES that substantial evidence exists in this case to support the court's implicit conclusion that either reunification services were not required or, alternatively, that the efforts CPS made were legally sufficient.

¶11 There was significant evidence that Eric, like the mother in *Toni W.*, had failed to make "'the full commitment to the responsibilities of parenthood' that warrants substantial protection of the parental interests under the due process clause." 196 Ariz. 61, ¶ 14, 993 P.2d at 467, *quoting Lehr v. Robertson*, 463 U.S. 248, 261 (1983). The juvenile court found, for example, that Eric never had acted affirmatively to prove paternity, and his paternity of two of the children had been established only because the state was seeking his contribution to child support. Nor, the court found, had Eric taken advantage of the state's paternity proceedings to obtain orders for custody or parenting time "which would have strengthened his relationship with the children while protecting them from [Felicia's neglect and abuse]."[4] The court reasonably could have concluded that, like the mother in *Toni W.*, Eric "had not

[4]Eric does not challenge these findings on appeal, and we therefore regard them as conceded. *See Britz v. Kinsvater*, 87 Ariz. 385, 388, 351 P.2d 986, 987 (1960) (when findings not challenged on appeal, reviewing court "may assume that their accuracy is conceded").

'come forward to participate in the rearing of his child[ren],'" and that ADES therefore was not required to provide him with reunification services. *Id.* ¶ 13, *quoting Lehr*, 463 U.S. at 261.

¶12 Moreover, the evidence also supported a conclusion that ADES had made appropriate efforts to reunify the family but Eric had failed to respond to those efforts. ADES is not obligated "to ensure that a parent participates in each service it offers." *In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). Eric's total failure to engage with CPS lends credence to the assertion that ADES's efforts were sufficient. Because Eric had demonstrated no interest in visitation or other services and rarely attended relevant court hearings, ADES cannot be faulted for failing to do more. A parent's incarceration, standing alone, neither provides a legal defense to a claim of abandonment, nor justifies "a [parent's] failure to make more than minimal efforts to support and communicate with his child." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶¶ 21-22, 995 P.2d 682, 686 (2000). A parent whose "'circumstances prevent [him] from exercising traditional methods of bonding with his child . . . must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary.'" *Id.* ¶ 22, *quoting In re Pima County Juv. Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994).

¶13 The same may be said of a parent's obligation to participate meaningfully in reunification services. An incarcerated parent who has limited services available to him may

thus be expected to make the most of the support and services that are offered because "[t]he burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity." *Id.* ¶ 25. Here, the juvenile court concluded, "Although [Eric] is in custody and therefore greatly hampered in his ability to work most aspects of the case plan, he could have been in written or telephonic contact with the caseworker. [He] also could have stayed in written contact with the children. He did neither."

¶14 Because we conclude the juvenile court's order terminating Eric's parental rights on the ground of abandonment was supported by the evidence and consistent with substantive due process, "we need not address [his] claims pertaining to the other grounds" also found by the court. *Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205. The court's termination order is affirmed.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge