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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JERMAINE S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and TATUM S., Appellees.	2 CA-JV 2010-0006 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200800008

Honorable Stephen M. Desens, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 In an order entered on January 4, 2010, the juvenile court terminated the parental rights of appellant Jermaine S. to his then-four-year-old daughter Tatum S. The

statutory grounds for termination were chronic substance abuse, *see* A.R.S. § 8-533(B)(3), and both nine-month and fifteen-month out-of-home placement, *see* § 8-533(B)(8)(a), (c). On appeal, Jermaine challenges the sufficiency of the evidence to prove any of the statutory grounds alleged or to establish that terminating his rights was in Tatum's best interests. We affirm.

¶2 To terminate a parent's rights, a juvenile court must find by clear and convincing evidence at least one statutory ground for severance and must find by a preponderance of the evidence that terminating the parent's rights will serve the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we must 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, ¶¶ 8-9, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶3 Before Child Protective Services (CPS) took her into protective custody in February 2008, twenty-six-month-old Tatum had been living with her mother, Brandi J., in an apartment in Sierra Vista. Police officers executing a search warrant for the apartment found Tatum in the care of a babysitter and found methamphetamine and drug paraphernalia in places readily accessible to the child.[1] At the time, Jermaine was in a

[1]Brandi later pled guilty to possessing more than nine grams of methamphetamine for sale. She was sentenced in October 2008 to a partially aggravated, six-year prison

Salvation Army halfway house in Tucson, participating in a rehabilitation program there, after having recently been released from incarceration on domestic violence charges.[2] Both Jermaine and Brandi reported that drug use and domestic violence figured prominently in their relationship, which had begun in 2004.

¶4 When Jermaine learned that Tatum had been taken into custody, he left the Salvation Army program, contacted CPS in Sierra Vista, and asked to participate in reunification services so he could parent Tatum. Beginning in late February 2008 and continuing through September 2009, the Arizona Department of Economic Security (ADES) offered him a variety of rehabilitative services—including substance abuse testing and treatment, psychological testing, individual counseling, anger management classes, parenting classes, and supervised visitation with Tatum—in which Jermaine participated to varying degrees over time.

¶5 Tatum was adjudicated dependent in March 2008 based on Jermaine's admissions to the allegations in the dependency petition, as amended. Among the allegations he admitted was that he had "an extensive criminal history" that included a serious assault on Brandi while she was pregnant with Tatum's younger sister Kayanna,

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term for that offense. The juvenile court terminated her parental rights to Tatum at the same time it ordered Jermaine's rights terminated.

[2]During his psychological evaluation by Dr. Philip Balch, Jermaine told Balch he had already spent eleven months on probation—apparently in 2006 and 2007—for an offense involving domestic violence against Brandi before he violated the terms of his probation and was incarcerated from April 4 until September 14, 2007. Upon his release from custody, he went to the Salvation Army rehabilitation program and was there from September 14, 2007, until early February 2008.

born in April 2007. In late April 2008, Jermaine was incarcerated again for violating the terms of his probation by having had contact with Brandi. He remained in prison until November 19, 2008.

¶6 Upon his release, Jermaine was given what the case manager described as a rare opportunity. Since June 2008, Tatum had been living in the home of Sophie and James Thomas. Jermaine and the Thomases' son had been friends in high school, and the Thomases had known Jermaine since at least 1996. Wanting to help him, the Thomases had first volunteered to be a temporary placement for Tatum. Then, when Jermaine was paroled from prison in November 2008, they agreed that he could live with them also. As Sophie Thomas testified, the plan was for Jermaine and Tatum to live together at the Thomases' home so he could "bond with Tatum, get to know Tatum again, [and] make the transition" to becoming solely responsible for her care. ADES considered it "the perfect opportunity [for him] to gain parenting skills and knowledge" under the Thomases' supervision and with their support.

¶7 The arrangement lasted from November 2008 until early May 2009. For a time it worked well, and ADES allowed Jermaine to begin having unsupervised contact with Tatum. Between January and March 2009, however, Jermaine became less reliable and began leaving more of Tatum's care to the Thomases. When they confronted him, as they did at least twice, his behavior would improve temporarily then revert "back to his not being there for [Tatum]." In April, he refused to submit to a hair strand test for drug usage. Then, in early May 2009, after six months of living with the Thomases and

theoretically parenting Tatum, Jermaine relapsed.[3] He was arrested on May 8 for criminal trespass after "banging on doors" while looking for a friend's apartment; as he later told the CPS case manager, he had been high on ketamine and "out of his mind."

¶8 Released soon after that arrest, Jermaine apparently continued using drugs in May, then entered a residential treatment program on June 2. He spent the month of June 2009 in treatment and then completed an intensive outpatient treatment program. From July 2009 until the contested termination hearing on September 23 and October 2, 2009, he engaged fully in his case plan, participated in services, maintained his sobriety, developed a support network, obtained housing and employment, attended all but one of his scheduled visitations with Tatum, and in general had complied with the requirements of his case plan in almost every way.

¶9 Nonetheless, after the contested termination hearing, the juvenile court terminated Jermaine's parental rights. The court found that, despite his commendable recent progress, his "[n]inety days of sobriety and the successful completion of a substance abuse program [did] not establish or demonstrate the requisite stability or permanency needed to indicate that [Jermaine] will be able to parent in a normal and effective manner in the near future."

[3]Jermaine's relapse and arrest coincided with what appears to have been his first opportunity to be solely responsible for Tatum without the Thomases' assistance. Sophie Thomas testified she had gone to join her husband in Florida for four days and had left Jermaine to care for Tatum after arranging for other people to provide "backup" for him. Jermaine instead left Tatum with a friend, went out ostensibly to make a telephone call, and failed to return.

¶10 To terminate parental rights pursuant to § 8-533(B)(3), a juvenile court must find not only that the parent is "unable to discharge parental responsibilities because of . . . a history of chronic abuse of dangerous drugs, controlled substances or alcohol" but also that "there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." Jermaine acknowledges he has a history of chronic substance abuse but contends ADES failed to prove that "the problem" is likely to continue for a prolonged, indeterminate time. In essence, Jermaine argues his successes over the preceding three to four months showed that "[h]is drug abuse had ended" and therefore would not persist indefinitely.

¶11 The record supports the juvenile court's finding to the contrary. At the time of the termination hearing, Jermaine was thirty years old. He reported that his substance abuse history had begun with drinking alcohol when he was eight or nine years old. He began using marijuana and "acid" in high school and used methamphetamine regularly between the ages of seventeen and nineteen. After a period of intermittent use, he then resumed using methamphetamine heavily in 2004. He also reported having used cocaine and crack cocaine. Dr. Balch, who performed Jermaine's psychological evaluation in 2008, testified it would take a considerable period of time to know whether Jermaine could truly sustain any of the positive changes he might have made:

> The history is so chronic over time, with incarcerations and relapses and domestic violence, that it would not be a matter of a short time to say: Okay, he hasn't had these problems in the last three months, six months, they're gone. . . . [T]his is kind of an ongoing problem. There wouldn't be a way of knowing that things have turned around, unless you have a substantial amount of time to look at the changes.

¶12 Sophie Thomas testified about Jermaine's pattern, while living with the Thomases, of doing well for a time and then reverting to old behaviors. His relapse in May 2009 came after Tatum had already been in foster care for fifteen months. And the case manager also testified that, given Jermaine's "history of doing well for a few months and then not doing well," she did not believe it was safe to place Tatum in his custody after he had achieved only four months' sobriety: "The substantial risks are that [Jermaine] has a chronic history of substance abuse and he's only been clean since, I believe, around June 1st, 2009. He hasn't been able to show stability throughout the case, and he hasn't been able to show that he can parent Tatum safely." Thus, the juvenile court's finding that there were reasonable grounds to believe Jermaine's addiction would continue for a prolonged, indeterminate period is supported by evidence in the record. It is also supported by case law. Like Jermaine, the father in *Raymond F. v. Arizona Department of Economic Security*, 581 Ariz. Adv. Rep. 29, ¶ 27 (Ct. App. May 20, 2010), similarly had "a substantial history of drug abuse, using a variety of drugs beginning at age [twelve]." There, the court observed:

> Father has been unable to rise above his addiction in a non-custodial and unstructured setting, similar to that in which a father would be expected to raise his children. Father's temporary abstinence from drugs and alcohol does not outweigh his significant history of abuse or his consistent inability to abstain during this case.

Id. ¶ 29.

¶13 In this case, even though Jermaine had made more progress in achieving sobriety than the father in *Raymond F.*, the evidence nonetheless provided reasonable

grounds for the juvenile court to believe Jermaine's history of chronic substance abuse was likely to persist "and continue to negatively affect his parenting abilities." *Id.* ¶¶ 8-10, 29. In effect, the court found, given a substance-abuse history spanning two-thirds of his life, Jermaine's four months of sobriety was insufficient to "demonstrate the requisite stability or permanency" necessary to show he was ready and able to parent Tatum effectively. In light of that pivotal finding, we consider moot—and thus do not address—Jermaine's contention that ADES failed to make reasonable efforts to reunify the family because it refused his request in August 2009 for extended, unsupervised, or overnight visitation with Tatum, thereby denying him the "chance to show how well he could parent his daughter." It was not a lack of parenting skills but Jermaine's historical inability to remain drug-free for any prolonged period that the court ultimately found dispositive.

¶14 Having determined that the record contains clear and convincing evidence to sustain the termination of Jermaine's parental rights pursuant to § 8-533(B)(3), we do not address his contentions pertaining to the other two statutory grounds on which the juvenile court also found severance justified. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d 682, 685, 687 (2000). We turn, then, to his remaining contention that terminating his rights was not in Tatum's best interests because she had a stronger bond and closer relationship with Jermaine than with her current foster parents.

¶15 A juvenile court may find the termination of a parent's rights to be in the best interests of the child if a preponderance of the evidence establishes the child will benefit from severing the relationship or be harmed by its continuance. *See In re*

Maricopa County Juv. Action No. JS-500274, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-35 (1990) (best interests served if terminating parent's rights confers benefit on child); *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 15, 200 P.3d 1003, 1008 (App. 2008) (standard for proving best interests is preponderance of evidence). In assessing the child's best interests, the court may consider whether the child's present placement is meeting the child's needs, *In re Maricopa County Juvenile Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994); whether the child is adoptable, *In re Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994); and whether there is an existing plan for adoption, *Audra T. v. Arizona Department of Economic Security*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1988). Although "the immediate availability of an adoptive placement" is relevant to a best-interests finding, *Audra T.*, 194 Ariz. 376, ¶ 5, 982 P.2d at 1291, "the court does not 'weigh alternative placement possibilities to determine' if severance is in the child's best interests," *Antonio M. v. Arizona Department of Economic Security*, 222 Ariz. 369, ¶ 2, 214 P.3d 1010, 1012 (App. 2009), *quoting Audra T.*, 194 Ariz. 376, ¶ 5, 982 P.2d at 1291.

¶16 The juvenile court concluded that terminating Jermaine's parental rights would serve Tatum's best interests based on the following findings:

> The child is residing in a licensed foster home that is committed to adopting her. The child's parents have failed to provide a safe and nurturing home for her since her birth. Termination of the parental rights will benefit the child because it will allow her to be adopted by a loving, stable couple who wish to provide for her permanently.

The case manager testified Tatum was in an appropriate, stable, adoptive placement that was able to meet her needs; she had "adjusted extremely well to their home," "ha[d] bonded with them," and was "happy . . . and really . . . attached to the family"; and, after having been in foster placements for approximately nineteen months, she was "finally safe and stable" and greatly in need of the permanency that severance and adoption would afford. The record thus amply supports the court's finding that terminating Jermaine's rights was in Tatum's best interests.

¶17 Accordingly, we affirm the juvenile court's order of January 4, 2010, terminating Jermaine's parental rights to Tatum.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge