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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 22 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSE L.,)	2 CA-JV 2011-0015
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF)	Appellate Procedure
ECONOMIC SECURITY, MARIANA L.,)	
and NAVEYA L.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J19113300

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Jacqueline Rohr

Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Jane A. Butler

Tucson
Attorneys for Appellee
Arizona Department of Economic Security

V Á S Q U E Z, Presiding Judge.

¶1 Jose L. appeals from the juvenile court's ruling terminating his parental rights to his daughters, Naveya L., born March 11, 2007, and Mariana L., born October 22, 2008. Jose argues the court's termination of his parental rights was not supported by sufficient evidence.

¶2 “[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court's decision, and we will affirm a termination order that is supported by reasonable evidence.” *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable factfinder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶3 Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), took custody of Naveya and Mariana in April 2009 and placed them in foster care after Tucson Police officers conducting a welfare check discovered their home, which Jose shared with the children's mother Megan, was “unclean and unsafe for the young children.” The officers found “trash and dirty clothes strewn throughout the home,” “small objects on the floor that were potential choking hazards,” “a kitchen knife laying on the floor,” and “dirty dishes that filled the sink and the counters, as well as rotting food.” There were no “diapers for the children,” the home had “minimal food,” and “the children appeared ‘malnourished.’”

¶4 Jose and Megan agreed to allow the children to remain in foster care or in a family placement¹ “until the parents could demonstrate they were drug free and that they could maintain a safe home for their children.” CPS inspected the home several times over the next month, but it remained in the same condition. When asked about the condition of the home, Jose told a CPS investigator that “he works ‘all the time’ and ha[d] not had time to clean the home, but w[ould] clean during his lunch break and days off.”

¶5 About a month after the children were removed from the home, Megan informed CPS she was ending her “abusive” relationship with Jose and had obtained a restraining order against him. Jose too obtained a restraining order against Megan. Shortly thereafter, Jose moved into his mother’s house, and Megan married and moved in with another man.

¶6 ADES filed a dependency petition in June 2009. Jose admitted the allegations in an amended petition and the juvenile court found the children dependent. The court ordered Jose to be referred for parent aide services and “demonstrate effective parenting.” It also ordered that he obtain a legal source of income; obtain a safe and stable home, maintained in a clean and safe manner; participate in weekly supervised

¹A paternal aunt and uncle passed background checks to allow the children to be placed with them, but ultimately declined to take the children. The paternal grandmother was also apparently considered as a placement, but was unable to pass the required background checks.

visitation once the restraining order against him was cleared; maintain contact with his case manager; and “participate in any other services recommended by CPS.”²

¶7 At a review hearing in September 2009, ADES “indicate[d] that the parents [we]re now fully engaged in services and . . . fully compliant with the case plan.” Jose attended one session of a parenting class, but then “was unable to attend any further parenting classes as he was in jeopardy of losing his job.” He was therefore referred for one-on-one parenting instruction, in which he participated. Although Jose was employed, he was living with his mother. In November, Megan separated from her new husband, renewed her relationship with Jose, and moved back in with him. By December of 2009, Jose had purchased a home, but was employed only part-time.

¶8 In April 2010, Jose’s case manager became “extremely concerned” because Jose and Megan had “recently engaged in domestic violence activity.” When the case manager conducted a home check in late April, she found Jose and Megan “arguing regarding a domestic violence dispute they had the night before” that had resulted in Jose calling the Tucson Police Department. As a result of the incident, the case manager requested “that the mother and father participate in anger management/domestic violence groups.” After six sessions of couple’s counseling, Jose and Megan had declined to continue, “minimiz[ing] any issues or conflicts in their relationship.” And Jose needed to apply for the Arizona Health Care Cost Containment System (AHCCCS) before he could

²At some point Jose was also subject to random urinalysis, on which he tested negative.

begin anger management and domestic violence classes, and he declined to engage in “counseling services or healthy relationship groups.”

¶9 By August 2010, Jose was “still in the process of making repairs” to the home he had purchased and reported “he [wa]s in jeopardy of losing his home due to financial issues.” He was employed only part time, and his employer reported he had been “showing up to work late and his current work performance [wa]s poor.” Megan was living with his mother. At a dependency review hearing that same month, the juvenile court changed the case plan from reunification to severance and adoption. The court noted that “fifteen months into the case . . . the children are [not] any closer to being able to be safely returned to the parents . . . than they were eight, almost nine, months ago.” The state thereafter filed a motion for termination of Jose’s parental rights based on time-in-care grounds pursuant to A.R.S § 8-533(B)(8)(a) and (c).

¶10 In November 2010, Jose completed healthy relationships and anger management courses. But, after a contested severance hearing in December 2010, the court terminated Jose’s parental rights, finding sufficient evidence supported termination based on either time-in-care ground. This appeal followed.³

¶11 In order to terminate Jose’s parental rights pursuant to § 8-533(B)(8)(c), the juvenile court had to find clear and convincing evidence that, despite ADES having provided “appropriate reunification services,” Jose’s children had been in out-of-home

³Megan’s parental rights also were terminated. She has separately appealed the juvenile court’s order and is not a party to this appeal.

placement for at least fifteen months, he had failed to remedy the circumstances causing his children to be in such placement, and there was a “substantial likelihood” he would “not be capable of exercising proper and effective parental care and control in the near future.” *See* A.R.S. § 8-863(B) (requiring clear and convincing evidence of statutory termination ground). Additionally, the court had to determine, by a preponderance of the evidence, that termination was in the children’s best interests. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22, 110 P.3d 1013, 1018 (2005) (termination in child’s best interests must be established by preponderance of evidence).

¶12 Jose argues the state failed to prove the grounds for severance by clear and convincing evidence. He maintains he has “completed every task asked of him” and “was not afforded the time and opportunity to demonstrate that he had benefitted from the [domestic-violence-related] classes that were added over a year into the case.” Although testimony at the severance hearing supports Jose’s assertion that he completed his case plan tasks, viewing the evidence in the light most favorable to the juvenile court’s ruling, as we must, *Jordan C.*, 223 Ariz. 86, ¶ 18, 219 P.3d at 303, we cannot say the court abused its discretion in determining the statutory grounds had been proven.

¶13 In its ruling, the juvenile court concluded that Jose and Megan “continued to be a couple” and that “[t]he most prominent safety threat to the children is the unaddressed history of documented [domestic violence] between the parents.” Apparently relying primarily on that basis, although also noting Jose’s slow follow-through in obtaining anger management and healthy relationship counseling, the court

ordered termination of Jose’s parental rights. We cannot say that no reasonable fact finder could have reached this conclusion. *See Denise R.*, 221 Ariz. 92, ¶ 10, 210 P.3d at 1266.

¶14 Despite Jose’s and Megan’s testimony that they were no longer together, there was evidence from which the juvenile court could draw a contrary inference. Megan testified she lives in Jose’s mother’s house, and other testimony established that Jose goes there to eat. Jose’s sister testified she had seen the two together “[a]t least six times in the last couple of months.” And the CPS case manager testified that she had also received information that the couple was together.

¶15 Likewise, there was evidence the couple had engaged in domestic violence and had not resolved those issues in their relationship. The case manager testified she was unsure of “the current status of [Jose’s] relationship” with Megan and they “have had domestic violence issues, which poses a safety risk to the children.” When Megan obtained a restraining order against Jose, she stated in her application that she had been the victim of domestic violence. She also told the case manager she was “tired of being in an abusive relationship,” and the case manager reported that although Megan “initially denied any domestic violence,” “she later stated that [Jose] has been abusive to her.” And, although Jose and Megan attended couple’s counseling sessions, the counselor reported they had not been “willing to work on or address the issues in their relationship” and had indicated “the only reason they were going . . . was because it was required by CPS.” Thus, although the case manager stated they had been “compliant with going to

couples counseling,” she also testified they did not complete that case plan task successfully. That Jose denies any domestic violence, and that he is or plans to be in a relationship with Megan, is merely contrary evidence, which he essentially asks us to reweigh. That we cannot do. *See Jesus M. v. Ariz. Dept. of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (“The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.”).

¶16 Furthermore, although Jose did present evidence he had purchased a suitable home in which the children could live, the case manager continued to have concerns about his ability to maintain that housing. As recently as August 2010, Jose had indicated to the case manager “he [was] financially dependent on his mother.” And, although he had the same job throughout the case, he sometimes worked only part-time, and his employer was unhappy with his work performance. As a result, the case manager indicated she was unsure Jose could meet the children’s “basic needs” as he was “barely able to make his mortgage payment.”

¶17 And, Jose argues the juvenile court “misread[] the statute” because, he asserts, § 8-533(B)(8)(c) does not provide “the cut off time for allowing a parent to work a case plan, but [rather] the minimum amount of time [after which] a parent who is actively working a case plan would be at risk of having their parental rights terminated.”⁴

⁴Jose also asserts repeatedly that the case manager failed to create a written case plan. She conceded at the severance hearing she had not. But Jose cites no authority to

But, by the time of the severance hearing, the children here had been in an out-of-home placement for approximately twenty months, well beyond the fifteen months required under § 8-533(B)(8)(c). The plain language of that statute provides that parental rights may be terminated when the evidence demonstrates the child “has been in an out-of-home placement for a cumulative total of fifteen months or longer . . . , the parent has been unable to remedy the circumstances that cause the child to be in” that placement “and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future. And, contrary to Jose’s implicit suggestion,⁵ the “circumstances which cause the . . . out-of-home placement” are those “circumstances existing at the time of severance rather than at the time of the initial dependency petition.” *Maricopa County Juv. Action No. JS-8441*, 175 Ariz. 463, 467-68, 857 P.2d 1317, 1321-22 (App. 1993), *abrogated on other grounds by Kent K.*, 210 Ariz. 279, 110 P.3d 1013.

support his inherent contention that this failure should relieve him of his responsibility to remedy the circumstances that resulted in his children’s placement in out-of-home care. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument in opening brief “shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on”); Ariz. R. P. Juv. Ct. 106(A) (with limited exceptions not relevant here, Rule 13, Ariz. R. Civ. App. P., “appl[ies] in appeals from final orders of the juvenile court”).

⁵Jose asserts that the domestic-violence-related classes “were added over a year into the case for a ‘problem’ that ADES represented at trial to have been an ongoing concern. This is so even though they didn’t start the case with services to address this ‘concern’ that they now cite as their reason to terminate the father’s parental rights.”

¶18 Jose also argues there was insufficient evidence that severance of his parental rights is in the children’s best interests. He maintains that although “being adoptable or having an adoptive home available may be sufficiently compelling in some situations, it [is not] in this case” because “[t]here is no reason to believe that their relationship with their father [is not] beneficial to them and of far more importance than merely being adopted.” But, “[o]ne factor the court may properly consider in favor of severance is the immediate availability of an adoptive placement. Another is whether an existing placement is meeting the needs of the child.” *Audra T. v. Ariz. Dept. of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998) (citation omitted). Here both of these factors are present. The children have been in the same placement since May 2009, have a “strong, positive relationship” with their foster parents, and are bonded to them. The foster parents also are willing to adopt the children. And the case manager testified,

The children are in need of permanency. They have been in out-of-[home]care for approximately 18 months. The children appear to be very bonded and attached to the foster parents and refer to them []as their parents. The foster parents are able to meet the children’s needs and keep them safe. And the children need a permanent plan. They are really young and I believe that severance and adoption is in their best interest.

We therefore cannot say the juvenile court abused its discretion in determining severance was in the children's best interests. Thus, we affirm the court's order severing Jose's parental rights.⁶

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

⁶Because we affirm the juvenile court's finding that termination was warranted pursuant to § 8-533(B)(8)(c), we need not address its finding that termination also was warranted pursuant to subsection (B)(8)(a). *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (if evidence of one alleged severance ground sufficient, appellate court need not address additional grounds).