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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/11/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOE T.,) No. 1 CA-JV 12-0118
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, JOSEFINA T., JOE T.,) 103(G) Ariz.R.P. Juv. Ct.;
JOANNA T.,) Rule 28 ARCAP)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD19342

The Honorable, Joan M. Sinclair, Judge

AFFIRMED

The Stavris Law Firm, PLLC
By Alison Stavris
Attorney for Appellant

Scottsdale

Thomas C. Horne, Attorney General
By Jamie R. Heller, Assistant Attorney General
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Phoenix

G E M M I L L, Judge

¶1 Joe T. ("Father") appeals the juvenile court's order terminating his parental rights to Josefina, Joe, and Joanna (collectively, "the children"), pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (Supp. 2011).¹ For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Veronica R. ("Mother")² are the biological parents of Josefina, born 2005; Joe, born 2006; and Joanna, born 2009. Father has a history of criminal offenses, including three felony drug convictions prior to 2001. On December 17, 2008, Father was arrested and charged with felony possession of narcotic drugs for sale and felony possession of drug paraphernalia. Father subsequently pled guilty to one count of felony possession of narcotic drugs for sale and was sentenced in 2009 to five years in prison.

¶3 Father testified that at the time of his arrest, Josefina was living with him, Joe was living with paternal grandmother, and Joanna was unborn. Approximately 18 months after Father's arrest, the Arizona Department of Economic Security ("ADES") filed a petition on July 9, 2010, alleging the

¹ In this decision, we cite the current version of statutes that have not materially changed since the events at issue.

² Mother's parental rights to the children were terminated on May 16, 2012, and are not at issue in this appeal.

children were dependent as to Father and Mother for reasons of neglect. ADES specifically contended Father had neglected the children due to his five-year prison term and he had not provided for their basic needs, including food, clothing, housing, medical care, and financial assistance. At the time of the petition, Father had not established paternity of the children, had not had any contact with Josefina and Joe since his arrest on December 17, 2008, and had never met Joanna.

¶14 At the dependency mediation in August 2010, Father stipulated that the children were dependent as to him "based on his incarceration." All parties agreed Father would submit to paternity testing and participate in services available at the prison facility. Accordingly, if paternity was established, a psychological consultation would be performed to determine if visitation was appropriate. Visitation, however, was at the discretion of Child Protective Services ("CPS"), a division of ADES. Finally, Father agreed to CPS's proposed case plan of family reunification.

¶15 In September 2010, the juvenile court granted ADES's motion for paternity testing and ordered Father to participate. Father and the children all submitted to testing and the results established Father as the biological father of all three children.

¶16 In approximately October 2011, a psychological

consultation was performed with Father regarding whether visitation at the prison facility was appropriate for the children.³ CPS did not, however, approve sending the children to the prison to visit Father.

¶17 While incarcerated, Father participated in various classes including Men's Parenting, Dads 101, and the President's Initiative on Parenting. Father also sent CPS case manager Claudia Hoff four or five letters for the children. Hoff ensured the letters were read to the children and sent Father a letter with pictures of the children. Additionally, Hoff encouraged the children to draw pictures for Father. When presented with Father's letters, however, the children did not ask about Father and, in Hoff's opinion, did not seem to remember him. During Hoff's monthly visits, the children neither talked about Father nor initiated conversations about him. Father admitted that his incarceration deprived the children of having a normal relationship with him and negatively affected their parent-child bond.

¶18 ADES filed a motion to terminate Father's parental rights to the children on December 30, 2011, alleging that his felony conviction deprives him of his civil liberties and his

³ The record on appeal did not contain the content or results of the psychological evaluation. "Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

sentence was of such length that it would deprive the children of a normal home for a period of years. ADES also alleged termination was in the children's best interest. On May 16, 2012, after a contested severance hearing, the juvenile court found (1) Father's sentence would deprive the children of a normal home for a period of years, under A.R.S. § 8-533(B)(4), and (2) severance was in the children's best interests.

¶9 Father timely appeals and we have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21 (2003), and 12-2101 (Supp. 2011).

ANALYSIS

¶10 "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." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (citation omitted). Therefore, this court "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." *Id.* The juvenile court's interpretation of a statute, however, is reviewed de novo. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 43, ¶ 13, 178 P.3d 511, 515 (App. 2008).

¶11 Although the right to have custody of one's child is

fundamental, it is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000) (citation omitted). To terminate parental rights, a juvenile court must find the existence of at least one statutory ground provided in A.R.S. § 8-533 and find "that termination is in the best interest of the child." *Id.* While statutory grounds for termination require clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the best interests of the child. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 288, ¶ 41, 110 P.3d 1013, 1018, 1022 (2005).

¶12 Father does not contest the juvenile court's finding that severance was in the children's best interest. He argues, instead, that the length of his felony conviction sentence was insufficient to sever his parental rights under A.R.S. § 8-533(B). Therefore, we limit our analysis to this issue.

¶13 Under A.R.S. § 8-533(B)(4), in relevant part, the termination of a parent-child relationship is justified when "the parent is deprived of civil liberties due to the conviction of a felony . . . if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." See *Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986) (defining "normal home" as a home in which the parent has a presence). In

making this determination, however, there is no "bright line" rule based upon a specific sentence length. *Michael J.*, 196 Ariz. at 251-52, ¶ 29, 995 P.2d at 687-88. Instead, the court considers relevant factors including:

(1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

Id. In considering the factors, the determination is to be an "individualized, fact-specific inquiry" with no threshold level under each factor compelling or forbidding severance. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 450, ¶ 15, 153 P.3d 1074, 1079 (App. 2007).

¶14 The facts in the record support the juvenile court's finding that Father's prison sentence would deprive the children of a normal home for a period of years under A.R.S. § 8-533(B)(4). When Father went to prison, Josefina was three years of age, Joe was two years of age, and Joanna had not yet been born. In assessing Father's relationship with Josefina and Joe at the time of his arrest and incarceration, the juvenile court

recognized the relationships were the same as expected of any parent of two children at that age. Even so, the juvenile court also recognized the lack of a parent-child relationship considering the children had not seen Father in three years, a time span covering more than a third of Josefina's life, a majority of Joe's life, and the entirety of Joanna's life.

¶15 In addition, Hoff testified that the children did not seem to remember their Father. She explained that the children neither initiated conversations regarding Father nor talked about him, thereby indicating their relationship with Father was not strong.

¶16 Father argues CPS deprived him of his right to have consistent visitation with the children while incarcerated, which inhibited his ability to maintain a parent-child bond. There is no evidence in the record, however, showing Father took any action to contact the children during the first year and a half of his incarceration, prior to CPS's involvement. Although Father claims an entitlement to services, CPS has no duty to provide reunification services when termination is based on length of sentence. *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶¶ 6-7, 106 P.3d 327, 328 (App. 2005). "The damage to the parent-child relationship that justifies severance stems from the enforced physical separation of the parent from the child, and nothing [CPS] has to offer in the way of services can

affect that reality." *Id.* at 3, ¶ 9, 106 P.3d at 329. The mediation agreement provided CPS the power to determine if Father would have visitation, and CPS ultimately determined visitation with Father was not appropriate.

¶17 Father also argues that the length of his sentence does not support termination. He points out that he "only had an additional year and a half before release" at the time of the severance trial. The statutory ground for severance under A.R.S. § 8-533(B)(4), however, is based on the entire period of a parent's prison term and absence from the home, not the sentence remaining at the time of the severance trial. *Jesus M.*, 203 Ariz. at 281, ¶8, 53 P.3d at 206. Additionally, "the court must consider the entire length of the sentence and not whether the parent may be parole eligible within that time." *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 354 n.3, ¶ 12, 972 P.2d 684, 687 n.3 (App. 1998). The record supports the juvenile court's consideration of the length of Father's prison term.

¶18 Other relevant factors, including the availability of another parent and the effect of a parental absence on the child, should also be considered. Father does not dispute that Mother would be unavailable to provide a "normal home" for the children. Additionally, Father recognized that his incarceration had deprived the children of having a normal

relationship with him and that it had negatively affected their parent-child bond. The children have been without a father's presence since December 2008.

¶19 Finally, Father relies on the decision in *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 225 P.3d 604 (App. 2010), in which this court affirmed the juvenile court's denial of an ADES's motion to terminate parental rights under A.R.S. § 8-533(B)(4). Father's reliance, however, is misplaced. In *Matthew L.*, this court viewed the evidence in the light most favorable to sustaining the juvenile court's ruling and emphasized the discretion vested in the juvenile court to consider and weigh all relevant factors. *Id.* at 551, ¶ 19, 225 P.3d at 608. Because reasonable evidence supports the juvenile court's order terminating Father's parental rights, we find no abuse of the juvenile court's considerable discretion.

¶20 Sufficient evidence in the record supports the juvenile court's finding that Father's sentence would deprive the children of "a normal home for a period of years" in accordance with A.R.S. § 8-533(B)(4).

CONCLUSION

¶21 For the foregoing reasons, we affirm the juvenile court's order terminating Father's parental rights to the children.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
ANN A. SCOTT TIMMER, Presiding Judge

_____/s/_____
MARGARET H. DOWNIE, Judge