

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND 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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID L. ,) 1 CA-JV 12-0280
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv.
SECURITY, M.M. ,) Ct.; Rule 28 ARCAP)
)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD509431

The Honorable Brian K. Ishikawa, Judge

AFFIRMED

Christina Phillis, Maricopa County Public Advocate Mesa
by Suzanne Sanchez, Deputy Public Advocate
Attorneys for Appellant David L.

Thomas C. Horne, Attorney General Tucson
by Laura J. Huff, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

T H U M M A, Judge

¶1 David L. appeals from the superior court's order terminating his parental rights to M.M.¹ Finding no error, the order is affirmed.

FACTS AND PROCEDURAL HISTORY²

¶2 David is the biological father of M.M., who was born in 2008.³ Nine months before M.M.'s birth, David was arrested and then convicted of felony charges; David was sentenced to 12 years in prison. David has been incarcerated all of M.M.'s life.

¶3 In July 2011, when M.M.'s mother was arrested, the Arizona Department of Economic Security (ADES) took physical custody of M.M. and filed a dependency petition. After M.M. was found dependent, ADES filed a motion to terminate David's parental rights in May 2012 alleging length of felony sentence under Arizona Revised Statutes (A.R.S.) section 8-533(B)(4).⁴ During a contested severance hearing, ADES presented testimony

¹ The caption is amended to refer to the child by his initials.

² On appeal from an order terminating parental rights, this court views the evidence in the light most favorable to sustaining the superior court's findings. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

³ Although M.M.'s mother filed a notice of appeal from the order terminating her parental rights, she later filed a notice of no opening brief and her appeal was dismissed. Accordingly, Mother is not a party to this appeal.

⁴ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

that David had been incarcerated since before M.M.'s birth, was serving a 12 year prison sentence and would be released when M.M. was approximately 13 years old. ADES provided evidence that David had seen M.M. once and had not requested visitation at any point; M.M. had no "real understanding" of who David is; David had sent M.M. drawings and letters; Mother was unable to care for M.M. and M.M. was in a relative placement with siblings and the placement was willing to adopt the children.

¶14 After considering the evidence presented, the superior court granted ADES' motion and terminated David's parental rights. The court found ADES had proven the length of felony sentence ground alleged because David's sentence would expire in 2021; the "total length of [David's] incarceration will preclude him from providing [M.M.] with support, supervision and nurturing;" David failed to develop a parent-child relationship with M.M.; David "had not made diligent efforts to establish a parent-child relationship with [M.M.] since his incarceration;" no other parent was "able to provide [M.M.] a normal home life" and severance was in M.M.'s best interests by providing M.M. "with permanence and stability" and "would further the plan of adoption."

¶15 From that order, David timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 8-235.

DISCUSSION

I. Standard Of Review.

¶6 The superior court may terminate the parent-child relationship only upon a finding that clear and convincing evidence supports at least one statutory ground for severance and that a preponderance of the evidence shows severance to be in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). This court reviews a severance ruling for an abuse of discretion, accepting factual findings unless clearly erroneous. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004).

II. The Superior Court Did Not Abuse Its Discretion In Finding ADES Proved A Proper Ground For Termination.

¶7 David argues the superior court erred in terminating his parental rights because ADES failed to prove the length of felony sentence ground codified in A.R.S. § 8-533(B)(4). Primarily, David argues the court failed to properly consider his pending criminal appeal. David also argues the court improperly found that (1) he failed to maintain a parent-child relationship and (2) M.M. was deprived of a normal home.

¶8 A.R.S. § 8-533(B)(4) provides, in relevant part, that:
Evidence sufficient to justify the termination of the parent-child relationship

shall include [t]hat 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.

"[T]he length of a parent's sentence is not dispositive," and the court "must consider the many facts and circumstances specific to each case." *Jesus M. v Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 9, 53 P.3d 203, 206 (App. 2002).

¶9 David is serving a 12 year prison sentence as a result of his felony convictions. Although David contends his pending criminal appeal may result in a reversal, which could mean he might be released sooner, no such reversal or early release has occurred. Even if David is released prior to serving the entire sentence, he has been incarcerated continuously during M.M.'s entire life, and M.M. will turn five later this year. As noted long ago, in a different context, a sentence of "nine years, or five years imprisonment at the time of hearing complies with the requirements of the statute as a matter of law." *Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575-76, 720 P.2d 548, 550-51 (App. 1986) (rejecting argument that parole eligibility shortened sentence; "whether [father] may or may not make parole is irrelevant and does not control").

¶10 Apart from the fact of David's criminal appeal, the Arizona Supreme Court has identified six non-exclusive factors in assessing a length of felony sentence ground for severance:

(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.

Michael J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000). The record presented shows that the superior court properly considered these factors.

¶11 David was incarcerated when M.M. was born, meaning there was no parent-child relationship at that time. David had seen M.M. just once during his life; David failed to make "diligent efforts to establish a parent-child relationship with [M.M.] since his incarceration;" at the time of severance, M.M. was four years old and did not know who David was; David is not scheduled to be released until M.M. is approximately 13 years old and Mother could not provide a normal home for M.M. Moreover, given M.M.'s young age and the fact that Mother's parental rights have been severed, the impact of the deprivation

of a parental presence on M.M. is profound. On this record, the superior court's *Michael J.* findings were supported by clear and convincing evidence and were not in error.

III. The Superior Court Did Not Abuse Its Discretion In Finding Termination Of The Parent-Child Relationship Was In M.M.'s Best Interests.

¶12 In addressing best interests, the superior court "must find either that the child will benefit from termination of the relationship or that the child would be harmed by continuation of the relationship." *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998). Factors the court "may properly consider in favor of severance" include "the immediate availability of an adoptive placement" and "whether an existing placement is meeting the needs of the child." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998).

¶13 The superior court found that termination of David's parental rights "would benefit [M.M.] because it will provide [him] with permanence and stability. . . . [and] would further the plan of adoption. Adoption will provide [M.M.] with permanency, and a safe, stable, loving home." Although David contends the adopting relative's age rendered her unsuitable for providing permanency and stability to M.M., David has not shown that the court abused its discretion in finding that severance was in M.M.'s best interests.

¶14 M.M. is clearly adoptable. Moreover, his potentially-adoptive placement was described as "amazing," M.M. is bonded to his placement and his placement was meeting M.M.'s needs. The court did not abuse its discretion in finding that termination of David's parental rights was in M.M.'s best interests. See *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994) (in addressing best interests analysis, noting ADES "need not show that it has a specific adoption plan before terminating a parent's rights; [A]DES must show that the children are adoptable").

CONCLUSION

¶15 Because the superior court did not err, the order terminating David L.'s parental rights to M.M. is affirmed.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

/S/_____
DONN KESSLER, Judge