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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 7/2/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HENRY R. ,) 1 CA-JV 13-0011
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv.
SECURITY, H.R. ,) Ct.; Rule 28 ARCAP)
)
Appellees.)
)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD20277

The Honorable Jay R. Adleman, Commissioner

AFFIRMED

David W. Bell
Attorney for Appellant

Mesa

Thomas C. Horne, Arizona Attorney General
By Michael F. Valenzuela,
Assistant Attorney General
Attorneys for Appellees

Phoenix

T H O M P S O N, Judge

¶1 Henry R. (Father) appeals from the juvenile court's order terminating his parental rights to his son (the child).¹ Father argues the court erred because the Arizona Department of Economic Security (ADES) failed to show by clear and convincing evidence that Father's prison sentence was of such length to legally justify the termination of his parental rights. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY²

¶2 Father has a criminal record dating back to 2003 involving felony drug and domestic violence convictions. In October 2010, Father pled guilty to a domestic violence assault charge. Father had probation violations in February and March of 2011, and the March violation was charged as a new offense of one count of possession or use of marijuana. Father again pled guilty to the charge. In April 2011, Father was in jail when Shannon K. (Mother), who was also in jail, gave birth to the child.³ The child tested positive for methamphetamine at birth.

¹ The caption has been amended to safeguard the identity of the juvenile pursuant to Administrative Order 2013-001.

² We view the facts in the light most favorable to sustaining the juvenile court's ruling. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005). We do not reweigh the evidence, and we defer to the fact-finder's resolution of any conflicts in the evidence. See *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 257, ¶ 22, 159 P.3d 562, 567 (App. 2007); *Lashonda M.*, 210 Ariz. at 82, ¶ 16, 107 P.3d at 928.

³ Mother is not a party to this appeal.

Mother refused to provide any information about potential caregivers, and the identity of Father was not yet known. Consequently, Child Protective Services (CPS) took temporary custody of the child and placed him in a licensed foster home when Mother returned to jail. Shortly thereafter, the child was moved to a kinship placement that was willing and able to adopt the child if reunification was not possible. In July 2011, ADES filed an amended dependency petition naming Father as the child's father and alleging that Father's incarceration prevented him from caring for the child. The juvenile court found the child dependent and approved a case plan of family reunification.

¶13 Father sent postcards to the child's CPS case manager between July and September asking about the child. CPS attempted to take the child to the jail for a visit with Father, but the jail did not permit the visit. Father was released from jail on November 16, 2011, and was assigned a case manager through behavioral health services. The following week, CPS provided him a two-hour visit with the child, and offered weekly two-hour visits thereafter. CPS also offered Father living skills classes along with group therapy, drug testing, psychological evaluation, transportation assistance, health services, and parent-aide services. Father did not participate

in the offered services and did not visit the child again after the initial visit.

¶14 Father was again arrested on January 18, 2012, for possession of the dangerous drug methamphetamine. Father pled guilty to the charge, and the superior court sentenced him to two-and-one-half years of incarceration with forty-three days of presentence incarceration credit.⁴ After his return to prison, Father did not send any correspondence or gifts to the child, and he never requested additional visits with the child. On August 7, 2012, ADES moved to sever Father's parental rights to the child under Arizona Revised Statutes (A.R.S.) section 8-533(B)(4) (2007) because Father's sentence was of such a length that the child would be deprived of a normal home for a period of years.

¶15 At the severance hearing, CPS case manager Deborah Alyea testified that no bond existed between Father and the child before or since Father's incarceration. She opined that it would be very difficult for Father to nurture a parent-child relationship while in prison, and that Father's incarceration would deprive the child of a normal home because the child would have spent his entire life living and bonding with his foster placement and not Father. Alyea explained that the child had no

⁴ Father's sentence expires in July 2014. He would not be able to parent until at least July of 2015, after a year of sobriety.

other parent available to care for him because Mother also remained incarcerated. She also testified that Father had not done anything to change the issues that brought the child into care.

¶16 The juvenile court held that clear and convincing evidence supported severing Father's parental rights due to the length of his sentence and that termination was in the best interests of the child. It found that ADES had made reasonable efforts to reunify the child with his parents and that any further reunification efforts would be futile. Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶17 Father argues that: (1) the parent-child relationship could be nurtured while he completes his prison sentence; (2) his prison sentence is not lengthy; and (3) the child has not been harmed by the lack of parental presence.

¶18 Parental rights may be severed "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." A.R.S. § 8-533(B)(4). The statute does not reference a specific time period because the length of the sentence is not dispositive. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 9, 53 P.3d 203, 206 (App. 2002); *James S. v. Ariz. Dep't of Econ. Sec.*, 193

Ariz. 351, 354, ¶ 14, 972 P.2d 684, 687 (App. 1998). In *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000), the supreme court stated that the trial court should consider all 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.

¶9 Father does not dispute the juvenile court's findings on factors one, three, and five, that he effectively had no relationship with the child prior to incarceration, that his incarceration will deprive the child of a normal home, and that there is not the availability of another parent to provide a normal home life. However, as to the second *Michael J.* factor, Father argues that no testimony or evidence was presented at trial to suggest that he could not have regular and meaningful visitation with the child.

¶10 The record shows that Father had difficulties nurturing the relationship even when he did not have the

significant impediment of incarceration. Since the child's birth in April 2011, Father has spent a total of two hours with the child. Father did not take advantage of the visitation or services offered when he was not in jail. While incarcerated, Father has never sent any correspondence to the child, he has not sent gifts, and he has not requested any visitation with the child. He has shown minimal interest in having any contact with the child at all, let alone regular and meaningful visitation. As a practical matter, incarceration "typically preclude[s] all but minimal visits." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 451, ¶ 17, 153 P.3d 1074, 1080 (App. 2007). The juvenile court was "free to consider that minimal prison visitation weighed in favor of severance under this factor in the trial judge's decision-making calculus." *Id.* The CPS case manager testified at trial that it would be "very difficult" for Father to continue or nurture a relationship with the child during his incarceration. This testimony and evidence supports the trial judge's findings that Father would not be able to adequately foster the parent-child relationship during his incarceration.

¶11 Regarding the fourth *Michael J.* factor, length of sentence, we hold this also weighs in favor of the juvenile court's findings. While we agree with Father that his sentence is not particularly lengthy, the juvenile court must consider

"the entire period of the parent's incarceration and absence from the home" because "[w]hat matters to a dependent child is the total length of time the parent is absent from the family, not the more random time that may elapse between the conclusion of legal proceedings for severance and the parent's release from prison." *Jesus M.*, 203 Ariz. at 281, ¶ 8, 53 P.3d at 206. Father argues that he will serve just slightly more than two years and that this is not a lengthy sentence. However, this contention does not adequately represent the actual circumstances of this case. Father was incarcerated at the time of the child's birth and was not released until the child was seven months old. It is unclear exactly how much time Father spent out of jail, whether one month or two, when he was re-arrested on the current conviction. Thus, Father will have been incarcerated for almost the entirety of the child's life. Given the lack of any meaningful relationship with the child, we agree with the trial court that the length of the sentence is sufficiently long to deprive the child of the opportunity of a normal relationship with his father. In making this determination, we also consider the damage that would result to the child by removing him from the only home and family he has ever known.

¶12 As to the final *Michael J.* factor, Father asserts that the child has not been harmed by the lack of parental presence

