IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARK S., *Appellant*,
v.

DEPARTMENT OF CHILD SAFETY, L.S., *Appellees*.

No. 1 CA-JV 16-0362
FILED 2-21-2017

Appeal from the Superior Court in Maricopa County
No. JD528124
The Honorable Timothy J. Ryan, Judge

AFFIRMED

COUNSEL

Denise L. Carroll, Scottsdale
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Cathleen E. Fuller
Counsel for Appellees

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which Chief Judge Michael J. Brown and Presiding Judge Samuel A. Thumma joined.[1]

O R O Z C O, Judge:

¶1 Mark S. ("Father") appeals the juvenile court's order terminating his parental rights to his son, L.S. For the following reasons, we conclude that reasonable evidence supports the court's order and therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Ninoska T. ("Mother") are the biological parents of L.S., born in December 2012.[2] In September 2014, with L.S. in the car, Mother's boyfriend was involved in a car accident and arrested for DUI. While enroute to pick up L.S. from the police station, Mother was stopped and cited for DUI. The police refused to release L.S. into her care and contacted the Department of Child Safety ("DCS"), which took L.S. into temporary custody. Mother told the police that Father was a "drug abuser" and currently in prison. Mother also stated that during her last encounter with Father, they engaged in domestic violence.

¶3 In early October 2014, DCS filed an in-home dependency and returned L.S. to Mother's care under a safety plan. As to Father, DCS alleged he neglected L.S. by failing to provide for his basic needs and was unable to parent due to domestic violence. In late October 2014, Mother and L.S. were involved in a car accident, resulting in a fatality. Mother tested positive for Methadone, Xanax, and marijuana, and DCS removed L.S. from Mother's care. Once Father's paternity was established in February 2015, DCS requested he participate in any services available to

[1] The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] Mother is deceased, having passed away during the pendency of the dependency proceedings. L.S.'s last name was changed after her death.

him while incarcerated, especially those related to substance abuse and parenting.

¶4 The court found L.S. dependent as to Father and, at DCS's request, changed L.S.'s physical custody, placing him with Father's parents (L.S.'s paternal grandparents). DCS then moved for termination of Father's parental rights pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533.B.4, length of felony incarceration. After a contested severance hearing in August 2016, where Father was present and testified, the juvenile court terminated his parental rights. Father timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 8-235.A and 12-120.21.A.1, -2101.A (West 2017).[3]

DISCUSSION

¶5 To support an order terminating parental rights, the juvenile court must find at least one statutory ground is supported by clear and convincing evidence. *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 78, ¶ 6 (App. 2005). Additionally, the court must find by a preponderance of the evidence that the termination is in the best interests of the child. *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, 285, ¶ 11 (App. 2011); A.R.S. § 8-533.B. As the trier of fact, the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of the witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). Accordingly, we will accept the court's findings of fact "unless no reasonable evidence supports those findings." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555 (App. 1997).

A. *Michael J.* Factors and Sufficiency of Evidence

¶6 Father argues the juvenile court improperly applied the law in determining whether his length of prison sentence would deprive L.S. of a normal home for a period of years and that insufficient evidence supports the court's termination order.

¶7 Under A.R.S. § 8-533.B.4, a parent's rights can be terminated when the parent "is deprived of civil liberties due to the conviction of a felony" or the length of the sentence is such "that the child will be deprived of a normal home for a period of years." There is no "bright line" definition of the length of time required to deprive a child of a normal home. *Michael*

[3] Absent material revisions, we cite to the current version of statutes and rules unless otherwise indicated.

J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, 251, ¶ 29 (2000). Instead, the trial court considers a non-exclusive list of factors:

> (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. at 251-52, ¶ 29. "[T]here is no threshold level under each individual factor in *Michael J.* that either compels, or forbids, severance. It is an individualized, fact-specific inquiry." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 450, ¶ 15 (App. 2007).

¶8 Father specifically argues the court erred in applying factors 4 and 6. First, as to factor 4 (the length of the sentence), Father was sentenced in November 2013 to a five-year prison term for drug-related and auto theft charges. His release dates range from July 1, 2017 (early release) to June 1, 2018 (maximum sentence). Father asserts that because he could be released somewhere between 10 to 22 months from the date of the court's severance order, this is not a sentence of a length so as to deprive L.S. of a normal home for a "period of years." The relevant period of time is the *entire period of incarceration*, however, not solely the time after entry of the termination order. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 8 (App. 2002) ("We conclude the legislature used the words 'will be deprived' in § 8–533(B)(4) to mean 'will have been deprived' in total, intending to encompass the entire period of the parent's incarceration and absence from the home."). Father's incarceration commenced in June 2013, when L.S. was less than six months old. At the time of the severance hearing in August 2016, L.S. was more than three and one-half years old. Even if Father were released early in June 2017, L.S. would have been

deprived of a normal home due to Father's incarceration for *a period of four and one-half years*, the vast majority of his young life.

¶9 As to the second contested factor, factor 6 (the effect of the deprivation of a parental presence on the child), the court found L.S.'s "understanding of a parental presence currently is an incarcerated individual who has no ability to provide a normal home for [him]." Father asserts that because L.S. lived with Father's parents, who regularly brought L.S. to see him in prison, and that L.S. could remain with them until Father was released and could assume custody, L.S. was not deprived of a parental presence. The "normal home" referred to in the statute, however, relates to Father's obligation to provide a normal home, not one provided by others, such as his parents. *See Maricopa Cnty. Juv. Action No. JS–5609*, 149 Ariz. 573, 575 (App. 1986). Father admitted he had virtually no relationship with L.S. from his birth until L.S.'s paternal grandparents began bringing him for prison visits in February 2015, when L.S. was just over two years old. When L.S. lived with Mother, Father did not send him cards or gifts. From February 2015 until the severance hearing in August 2016, when L.S. was over three and one-half years old, L.S. had only known Father as being in prison and unable to provide him a normal home.

¶10 Although Father only challenges the factors stated above and does not dispute the court's factual findings on the other factors, he argues severance was in error. We disagree. As to factor 1 (the length and strength of any parent-child relationship existing when incarceration begins), as discussed above, Father had virtually no relationship with infant L.S. when he went to prison in June 2013.

¶11 With respect to factor 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), the court found that at the time of the severance hearing, L.S. was approximately three and one-half years old and "Father's incarceration is depriving" L.S. of a normal home because he is in foster placement with family members. As stated above, Father has not provided, is not providing, and will not for some time, due to incarceration, provide L.S. with a normal home.

¶12 Under factor 5 (the availability of another parent), because Mother passed away during the dependency proceedings, no other parent is able to provide a normal life for L.S.

¶13 Finally, the court found factor 2 (the degree to which the parent-child relationship can be continued and nurtured during the incarceration) weighed in Father's favor and against severance. Nevertheless, Father contends that because he worked to establish a bond with L.S. while in prison, he should have been allowed to continue building on that bond by a reinstatement of a reunification case plan. It appears Father argues this one factor against severance should outweigh the other five factors in favor of severance. We disagree. First, the court considered each factor, attributed the appropriate weight, detailed its factual findings, and found DCS proved the grounds for severance by clear and convincing evidence. *See Christy C.*, 214 Ariz. at 450, ¶ 15. Moreover, Father essentially asks us to reweigh the evidence presented to the juvenile court, which we will not do on appeal. *See Xavier R. v. Joseph R.*, 230 Ariz. 96, 100, ¶ 12 (App. 2012).

B. Best Interests

¶14 Father challenges the juvenile court's decision that termination was in the best interests of L.S., asserting DCS failed to prove that L.S. would either "accrue an affirmative benefit" by severance or "incur a detriment" by continuing the parental relationship.

¶15 To prove that severance is in the child's best interests, DCS must show that the child would either benefit from severance or be harmed by a continuation of the parental relationship. *Mario G.*, 227 Ariz. at 288, ¶ 26. We will uphold the juvenile court's best interests determination if it is supported by a preponderance of the evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). It is sufficient that DCS show that severance would free a child for adoption, and that the child would benefit from finding an adoptive placement. *See Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 352 (App. 1994). Additionally, DCS can establish that termination is in a child's best interests by presenting evidence showing that an existing placement is meeting the needs of the child. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19 (App. 2004).

¶16 The juvenile court found that L.S. has been in foster care since October 2014, and severance would provide him with adoptive parents and the true permanency needed in his life. The DCS case manager testified that L.S. would benefit from termination by having a permanent living arrangement; the placement (paternal grandparents) is currently meeting his needs, is willing to continue, and wishes to adopt him. If the adoption by paternal grandparents falls through, L.S. is adoptable.

¶17 Father maintains, however, that he would prefer the imposition of a guardianship over termination of his rights. During closing argument, the guardian ad litem requested a guardianship be imposed, and the DCS case manager testified that L.S.'s placement prefers a guardianship over severance. The court specifically rejected Father's proposal of continuing L.S. indefinitely in an out-of-home placement while awaiting his release from prison. Further, the court found that no true permanency can come from suggesting, but not filing, a petition for guardianship. Because the juvenile court lacks jurisdiction to institute a guardianship *sua sponte* and no party filed for guardianship, this was not an option the court could consider. *See Ariz. Dep't of Econ. Sec. v. Stanford*, 234 Ariz. 477, 480, ¶¶ 13-14 (App. 2014).

CONCLUSION

¶18 On this record, we conclude that reasonable evidence supports the juvenile court's determinations that DCS proved Father's felony incarceration was for a length of time such that L.S. will be deprived of a normal home for a period of years, and that severance is in the best interests of the child. We therefore affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA