

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 01/07/2010
PHILIP G. URRY, CLERK
BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

RICHARD J.,) 1 CA-JV 09-0116
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Ariz.R.P.Juv.Ct.
ARIZONA DEPARTMENT OF ECONOMIC) 103(G); ARCAP 28)
SECURITY, SIERRA J.,)
Appellees.)
)
)

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-JD-0020060075

The Honorable Robert M. Brutinel, Judge

AFFIRMED

Law Office of Florence M. Bruemmer, P.C. Anthem
by Florence M. Bruemmer
Tanya R. Imming
Attorneys for Appellant

Terry Goddard, Attorney General Mesa
by Eric Devany, Assistant Attorney General
Attorneys for Appellees

I R V I N E, Judge

¶1 Appellant Richard J. ("Father") appeals the juvenile court's grant of the Arizona Department of Economic Security's

("the Department") motion to terminate the parent-child relationship between Father and Sierra J. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Jamie J. ("Mother") and Father are the biological parents of Sierra, who was born in September 1998. They are also the parents of two sons who are not parties to this appeal. In early 2000, Mother abandoned the three children, leaving them in Father's custody. Mother's parental rights were terminated by the juvenile court on March 25, 2009.

¶3 In August 2001, Father was convicted of attempted transportation of dangerous drugs for sale and possession of marijuana for sale. He was sentenced to 210 days incarceration and five years of probation. On August 20, 2004, Father was convicted of possession of marijuana for sale, possession of dangerous drugs for sale, and weapons misconduct. He was sentenced to three, 8.5, and three years incarceration for each count respectively. The three sentences were to run concurrently with each other and with the terms of his 2001 conviction. At the time, Sierra was five years old and living with him. Prior to his incarceration, Father arranged for his father, Richard J., and grandmother, Marilyn G., to take care of the children but did not establish a legal guardianship. He did, however,

provide his grandmother with power of attorney over the children on February 24, 2005.

¶4 In February 2006, while Sierra was still living with her grandfather and great-grandmother, the Department received a report "regarding the physical condition of the children and their unexcused absences from school." An investigation revealed the home was "unsafe and uninhabitable, due to broken glass, metal pieces, piping and other materials. All of the children had sustained injuries while being on the property. Sierra had been splashed in the face with gasoline and sustained burns . . . and [she] had a cut on her left eyelid, along with numerous other cuts and wounds." Marilyn agreed to keep the children in a motel until the home was made safe.¹ She did not, however, keep the children off the property. On September 27, 2006, the Department took the children into custody. They were later placed with their cousin and then in foster care.

¶5 On January 9, 2007, CPS worker Erin Boisvert reported that the children were having contact with Father by phone. Father sent the children cards on holidays and birthdays. On August 3, 2007, Sierra was evaluated by Dr. G. Joseph Bluth. Dr. Bluth diagnosed Sierra with post-traumatic stress disorder and

¹ "The residence had no running water, no sanitation, no electricity, exposed wiring, in excess of 10 dogs, and goats and chickens that roamed freely."

noted she was a child victim of neglect and sexual abuse. He stated she might have a depressive disorder, which was probably related to her feelings of neglect and abandonment by her biological family. Sierra reported sexual abuse by her uncles and there were unsubstantiated claims of sexual abuse by Father. Dr. Bluth concluded that "she is going to be a difficult child to manage, even in the best of organized homes. The case manager should attempt to find a stable residence or adoptive home for her as she is definitely in need of consistency, stability, and permanency."

¶6 On August 15, 2007, Father's attorney reported that Father was to begin having in-person visits with the children every three months. This was contingent upon a therapist determining that there was no "harm done" after the first visit. Until December 2007, Father and Sierra had telephone communication. This changed, however, when Father was moved to another facility for trial in December 2007. Father no longer had telephonic contact with Sierra after the move.

¶7 On August 30, 2007, the Department filed a motion to terminate the parent-child relationship between Father and Sierra on the basis that Father was deprived of his civil liberties due to a felony conviction and his sentence was of such a length that Sierra would be deprived of a normal home for several years pursuant to Arizona Revised Statutes ("A.R.S.") §

8-533(B)(4) (Supp. 2009). The Department also alleged it would be in the child's best interests to terminate the relationship.

¶8 In March 2009, the juvenile court held a termination hearing. At the hearing, Sierra's case manager Barbara Woods testified to the aforementioned facts. She also testified regarding her contact with Father, specifically that she had problems setting up phone calls with him through the Department of Corrections. Woods explained that she could have scheduled in-person visits for Father and Sierra but did not do so because Father's correctional officer did not think it was a good idea. Also, in her opinion, in-person visits would not be in Sierra's best interests. She testified that Sierra has special needs and requires structure and day-to-day guidance that could not be provided by Father. Woods stated that "Sierra love[d] her current foster parents and said that she would like to be adopted." Therefore, Woods concluded that it was in Sierra's best interests to remain in her current foster home because "[she] need[ed] a stable home [and] that sense of permanency and belonging because of her mental-health issues, the sooner she has [permanency], the better she will be as she goes forward into adulthood."

¶9 Father testified that he can be released in October 2010 with good time credits. He described the activities he and Sierra participated in prior to his incarceration. Father

expressed concern that he only received two calls from his children in 2007. He described the activities and programs he has taken advantage of in prison, including non-mandatory employment. At the close of the hearing, the court noted that based on the evidence, he was leaning towards termination. He wanted to conduct further research, however, on the Department's duty to provide reunification services to an incarcerated parent.²

¶10 On May 26, 2009, the juvenile court terminated Father's parental rights. The court reasoned that "the relationship between Sierra and her father has been virtually nonexistent for the last three years." Even before he was incarcerated, their relationship was "inconsistent because of his drug use and prior arrest." Although the court was troubled that CPS and the Department of Corrections did not provide visits, it noted that the above factors, combined with the length of Father's sentence, justified termination pursuant to A.R.S. § 8-533(B)(4).

² The court noted: "Under the best possible set of circumstances it's hard for me to imagine saying on the day you get out, assuming I don't terminate your parental rights, Sierra ought to go back with you. There has got to be time where we see how you do and you establish yourself and a relationship gets reestablished, so it'd be three years probably before I could reasonably talk about having Sierra actually live with you again. And, frankly, I am not sure it's fair to do that to her, to keep her in limbo for that additional period of time."

¶11 We have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21 (2003) and 12-2101(B)(2003).

DISCUSSION

¶12 "We will not disturb the juvenile court's disposition absent an abuse of discretion or unless the court's findings of fact were clearly erroneous, i.e., there is no reasonable evidence to support them." *Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996).

I. Length of Father's Incarceration

¶13 Father argues that the length of years of his incarceration is not of such length that Sierra would be deprived of a normal home for several years. He opines that he can maintain a normal parental relationship with Sierra. We disagree.

¶14 Before a juvenile court can terminate parental rights, it must find by clear and convincing evidence that at least one statutory ground for termination exists. *See Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). It must also determine by a preponderance of the evidence that termination is in the child's best interests. *Id.* Arizona Revised Statutes § 8-533(B) provides various factors that justify severing parental rights, including "[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." A.R.S. § 8-533(B)(4). The court should consider the entire length of incarceration and not just the remaining incarceration at the time of the termination hearing. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 8, 53 P.3d 203, 206 (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."). "Normal home" is defined as a home in which the parent is present. *Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986).

¶15 The Arizona Supreme Court has held that a court should "consider all relevant factors" in determining whether a parent's sentence falls under A.R.S. § 8-533(B)(4), 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.

Michael J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000) (holding that there is no "bright line" rule regarding how long a sentence should be for it to be a sufficient length under the statute). Incarceration alone is "merely one factor to be considered in evaluating the father's ability to perform [his] parental obligations." *In re Pima County Juv. Action No. S-624*, 126 Ariz. 488, 490, 616 P.2d 948, 950 (App. 1980).

¶16 The evidence here supports the juvenile court's determination that Father's sentence would deprive Sierra of a normal home for a period of years. Woods testified that Father and Sierra did not have a strong relationship prior to Father's recent incarceration. Father was "heavily involved with drugs and unable to truly focus on parenting," and was "not a constant figure in her life." He was incarcerated when Sierra was five years old, which did not allow for much time to develop their parent-child relationship. Therefore, reasonable evidence supports the conclusion that the parent-child relationship was not strong prior to Father's recent incarceration.

¶17 Reasonable evidence also supports the conclusion that the parent-child relationship could not be nurtured during Father's incarceration. Woods testified that Father's correctional officer did not think it would be healthy for Sierra to visit Father in-person. She described how Sierra

needed daily guidance and a lot of structure, both of which could not be provided by Father while in prison.

¶18 There is also reasonable evidence to conclude that Father's incarceration will deprive Sierra of a normal home, particularly given her age at the time of his incarceration. Sierra was five years old when Father was incarcerated. She was ten years old at the time of the termination hearing. Woods testified that Sierra "is of an age where she wants to do activities. She needs daily help with her homework. She requires supervision and a great deal of structure and since [Father] is incarcerated, he is unable to do that." It is not unreasonable to conclude that Father's incarceration during her formative years deprived her of a normal home. Moreover, Father's sentence was of substantial length, Sierra's mother was unable to care for her, and Sierra's psychologist reported that she suffered from anxiety problems as a result of feeling abandoned by her family.

¶19 Father argues that he can maintain a normal parental relationship with Sierra because he will be released within one or two years. Courts, however, should consider the entire length of incarceration, not just the time remaining at the time of the termination hearing. See *Jesus M.*, 203 Ariz. at 281, ¶ 8, 53 P.3d at 206. Father expects to be released in October 2010 but his maximum incarceration date is 2012. Even if he is released

in 2010, he would have no parental presence until that date. His relationship with Sierra has been almost nonexistent to this point. The trial judge who presided over all proceedings in the case said it would probably be at least three years before he would discuss letting Sierra live with Father.

¶20 Father also argues that the Department was not diligent in providing reunification services to him and Sierra. He claims this factor warrants reversal of the trial court's severing his parental rights. "[S]ubsection (B)(4) imposes no explicit duty on the Department to provide reunification services." *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2-3, ¶¶ 6, 9, 106 P.3d 327, 328-29 (App. 2005) (holding that "[i]n this case of a lengthy prison sentence, however, we conclude that reunification efforts were not required because prolonged incarceration is something neither the Department nor the parent could ameliorate through reunification services"). Although the Department was not required to provide reunification services, it did offer some services to Father. It offered paternity testing and arranged telephonic contact. Consequently, Father's argument that the Department failed to provide reunification services does not warrant reversal of the juvenile court's termination order.

II. Sierra's Best Interests

¶21 Arizona Revised Statutes § 8-533(B) also provides that "the court *shall* also consider the best interests of the child" in determining if severance is appropriate. Father argues that there was no psychological evaluation to determine the effect of the separation between Sierra and her brothers. Therefore, he contends that the Department did not prove that the best interests of Sierra would be served by terminating his parental rights.

¶22 Woods testified that it was in Sierra's best interests to terminate Father's parental rights. Sierra was participating in Girl Scouts, tae kwon do and making friends in school. She claimed that given Sierra's special needs and mental health issues, she "needs a stable home." Woods opined, "the sooner she has that [a stable home], the better she will be as she goes forward into adulthood." Dr. Bluth also reported that Sierra needed a stable home. Therefore, it was in Sierra's best interests to remain in her current foster care placement. Adoption would provide her with the stability and permanency she needs.

CONCLUSION

¶23 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

JON W. THOMPSON, Judge