IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06-24-010
PHILIP G. URRY, CLERK
BY: GH

CHASE L.,	)	1 CA-JV 09-0240
	)	
Appellant,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ALEXIS H.,	)	103(G) Ariz. R. P. Juv.
	)	Ct.; Rule 28, ARCAP)
Appellee.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS11235

The Honorable Roger E. Brodman, Judge

AFFIRMED

Steven Clark, P.C. By Steven G. Clark Attorney for Appellant	Phoenix
Cotto Law Firm, P.C. By Sylvina Cotto Attorney for Appellee	Scottsdale

K E S S L E R, Judge

¶1 Chase L. ("Father") appeals the superior court's order terminating his relationship with his minor child pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (Supp.

2009). For the reasons stated below, we affirm the judgment of the superior court.

FACTUAL AND PROCEDURAL HISTORY

¶2 Alexis H. ("Mother") filed a petition to terminate Father's relationship with their child based on Father's plea of guilty and ten-year sentence for aggravated assault against Mother. The evidence revealed that Father pled guilty to two counts of aggravated assault in violation of A.R.S. sections 13-1203 (2010) & -1204 (2010)[1]. Father received a sentence of ten-years' incarceration as a result of the assaults.

¶3 Father, who is still incarcerated, was not transported to the November 18 portion of the evidentiary hearing. Angela Craig,[2] one of Father's witnesses, testified without Father being physically or telephonically present after Father's counsel waived Father's presence for that particular witness. Both counsel and the court acknowledged that the waiver applied only to that particular witness.

¶4 The court recessed to facilitate Father's telephonic appearance for Mother's cross-examination. Father and his counsel objected to Mother's testimony being conducted without Father's physical presence, stating that without physical

[1] We cite the current version of these statutes because there has been no material change since the underlying events occurred.

[2] The record and the opening brief refer to this witness as both Angela and Angel.

presence Father is deprived of his right to confrontation. Defense counsel also argued that if the client was not in the lawyer's immediate physical presence during the proceeding it deprived Father of his right to counsel. Immediately before conducting Mother's cross-examination, the court acknowledged that Father still wished to be physically present for the cross-examination but declined to delay the proceeding to permit physical presence.

¶5 The court subsequently issued a written decision terminating Father's relationship with his child. The superior court found that Father pled guilty to one count of aggravated assault on February 1, 2008 and that he received a sentence of ten years incarceration.[3]

¶6 The superior court found that the length of the sentence would deprive the child of a normal home life. The court found that Father was never the child's primary caregiver, that during most of the child's first six months of life Father saw her approximately once per week and that Father was incarcerated for four months during his daughter's first year of life. The court found that Father has not seen his daughter since his incarceration began in October 2007. Daughter no

[3] The evidence indicates that Father pled guilty to two counts of aggravated assault and received ten-years' incarceration for one count and five-years' probation for the other.

longer remembered Father and no longer had any bond with him. The court further found that Father could not effectively parent while incarcerated, that the length of his sentence would cause him to miss several "critical" early years of the child's life, and that there is no reasonable means to establish a bond between Father and child.

¶7 The superior court also found that the nature of the crime Father was incarcerated for demonstrated his unfitness to parent. On the night of the crime, Father spent several hours calling Mother and threatening to kill her. Father then entered Mother's home while she and the child were sleeping and began stabbing Mother with a pen. This attack resulted in Mother being covered with blood and having a substantial amount of her hair ripped from her head. Although the attack did not directly involve the child, she was in the home when it took place.

¶8 Father filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-2101(B) (2003).

ANALYSIS

¶9 On appeal, Father argues that the superior court erred when it determined that 1) Father's offense was of such a nature as to demonstrate his unfitness to parent, 2) the sentence was lengthy enough to prevent the child from having a normal home life, and 3) termination was in the best interest of the child.

Father also argues that the superior court violated Father's right to due process by conducting part of the proceeding without Father's physical presence.

¶10 On appeal, we will affirm a severance order unless it is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.,* 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). Rather than reweighing the evidence, we "look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.,* 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004). The superior court needed to find either that the nature of Father's crime indicates unfitness to parent or that the length of his sentence would deprive the child of a normal home life for a period of years. A.R.S. § 8-533(B)(4). Additionally, the superior court must independently find that termination is in the child's best interest. A.R.S. § 8-533(B).

I. Father's Offense Demonstrates his Unfitness to Parent

¶11 Father contends that his offense does not demonstrate his unfitness to parent because his violent act was not directly against the child and on other occasions he was nurturing towards her. We disagree. "A felony proves unfitness if its commission permits a rational inference of unfitness." *Pima County Juv. Action Nos. S-826 & J-59015*, 132 Ariz. 33, 34, 643 P.2d 736, 737 (App. 1982). "To justify termination of parental rights, a parent's felony conviction must directly demonstrate

the individual's substantial unfitness to parent, as opposed to the general character defects reflected by the commission of any felony."[4] *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 252, ¶ 32, 995 P.2d 682, 688 (2000). Although the physical force of his blows did not fall on the child, Father exposed her to an environment in which her mother was injured by domestic violence. Exposing one's own child to domestic violence permits a rational inference of unfitness. The superior court had evidence from which it could determine that the nature of the crime demonstrates Father's unfitness to parent.

II. Father's Incarceration Will Interfere With the Child's Home Life

¶12 Father's ten-year incarceration will interfere with the child's normal home life.[5] Arizona has no "bright line" test distinguishing sentences which are long enough to deprive the child of a normal home life from those that are not. *Id.* at 251, ¶ 29, 995 P.2d at 687 (internal quotation marks omitted).

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[4] *Michael J.'s* analysis of A.R.S. § 8-533(B)(4) observes that all of the felonies enumerated as examples of crimes which demonstrate unfitness involve violence directed by a parent against a child under the parent's care. 196 Ariz. at 252, ¶ 32, 995 P.2d at 688. However, *Michael J.* also notes that the list may not be exhaustive and adopts a more general standard that the crime must directly demonstrate substantial unfitness to parent and not merely show poor character. *Id.*

[5] While the statute is written in the disjunctive, we address both grounds for termination enumerated in A.R.S. § 8-533(B)(4).

We consider each case on its own facts in light of the following six 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, 995 P.2d at 687-88. Of the six factors, only the fifth supports Father.

¶13 Father had a short and weak bond with the child prior to being incarcerated. The court found and the record supports that Father was never the child's primary caregiver, that during most of the child's first six months of life Father saw her approximately once per week, and that Father was incarcerated for four months during his daughter's first year of life.

¶14 The record supports the superior court's finding that Father cannot effectively maintain a bond with daughter during the incarceration. Although some evidence indicated that the jail had suitable visitation facilities and permitted substantial visitation, the superior court found that visitation was unworkable because Mother had become the child's sole caregiver, she would not voluntarily encourage a relationship between the child and Father, and that it would be unreasonable

to expect her to do so in light of Father's "vicious attack upon her." Absent personal visitation it would be practically impossible to establish a parental bond with a young child. *See Michael J.*, 196 Ariz. at 254, ¶ 43, 995 P.2d at 690 (Zlaket, J., concurring in part and dissenting in part) ("Letters or phone calls directly to the child would . . . provide[] little, if any, meaningful contact.").

¶15 The superior court found that the child's extremely young age combined with the length of the sentence exacerbated the impact of Father's incarceration on the child's normal home life.[6] Father's current incarceration began when the child was approximately one year old. Given the length of his sentence and his inability to have meaningful contact with the child from prison, Father would miss the time from age one until age ten or eleven. The court found that this time period includes the "critical first few years."

¶16 The superior court made several findings which were supported by the record indicating that termination of Father's rights will not harm the child and may help her. The superior court found that as of the time of the hearing no bond existed between Father and the child and the child had completely forgotten Father. Further, the superior court found that if the

[6] This paragraph combines consideration of the third and fourth enumerated factors.

relationship were allowed to continue, Father may abuse the child as a way of exercising further control over Mother. The superior court was justified in finding that termination will increase the child's "physical security" because of Father's "history of anger management problems, prior assaults, multiple DUI convictions, physical violence, domestic violence, and . . . a serious crime against [Mother]."

¶17 The only factor weighing against finding that the length of Father's incarceration will deprive the child of a normal home environment for a period of years is the home environment available from Mother. The superior court found that Mother had provided a safe home environment for the child. However, in light of the other five factors, the superior court did not abuse its discretion in finding that the length of the sentence deprives the child of a normal home life.

III. Termination is in the Child's Best Interest

¶18 The superior court found that termination was in the best interests of the child. Termination is in the best interest of the child if she benefits from the termination or would be harmed by the court's failure to terminate. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App. 2008) (citing *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 6, 100 P.3d 943, 945 (App. 2004)). The court found that not terminating the parental

relationship would expose the child to being abused herself or to growing up in an environment of domestic violence against her mother. The court also found that the child had no significant tie to Father or Father's relatives and she would benefit from the stable environment that Mother would be able to provide without having to fear Father.

¶19 Father contends that the superior court erred in finding that termination was in the child's best interest because 1) the child had once bonded with Father before Father's incarceration and Father behaved appropriately while in direct contact with the child, 2) the superior court did not conduct a bonding assessment and considered no evidence beyond Mother's testimony, and 3) no evidence was presented indicating that the child would be adopted. We disagree.

¶20 The mere fact that the child once had a bond with Father and that he conducted himself well in her immediate presence is not dispositive. The court had to weigh this evidence against the risk of abuse and the impact of Father's length of incarceration. *See Jesus M.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). The superior court is in the best position to weigh conflicting evidence regarding whether termination is in a child's best interests and we will not substitute our own judgment for that of the superior court. *Bobby G.*, 219 Ariz. at 511, ¶ 15, 200 P.3d at 1008 (citing *Jesus*

M., 203 Ariz. at 280, ¶ 4, 53 P.3d at 205). Although evidence of Father's generally amicable demeanor towards his daughter while in direct contact with her would weigh against a finding that termination is in the child's best interests, evidence that substantial contact with Father was unworkable during the duration of the incarceration and that the child would be exposed to a domestic abuse environment upon his release weighs in favor of finding that termination is in the child's best interest. The superior court did not clearly err in finding that the latter outweighed the former and determining that termination was in the child's best interest.

¶21 The superior court's failure to receive an expert bonding assessment does not render its decision erroneous.[7] We are aware of no authority requiring an expert assessment before termination based on the nature of a criminal offense or the length of an incarceration. Father contends that *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), mandates such an assessment. We disagree. *Mary Ellen C.* deals with the State's obligation to provide mental health services to parents before terminating parental relationships on the ground that the mental illness renders the parent unable to

[7] Although no expert testified on the bond between Father and daughter, the superior court did make factual findings on the past and present bond between them based upon the testimony of lay witnesses.

fulfill parental duties. 193 Ariz. at 192, ¶ 34, 971 P.2d at 1053. The error was not the State's failure to introduce expert testimony but its failure to prove "by clear and convincing evidence that additional [mental health] services would have been futile." *Id.* at 193, ¶ 39, 971 P.2d at 1054. The superior court's entry of an order without expert testimony is not clearly erroneous.

¶22 Additionally, we find Father's claim that the superior court considered nothing but Mother's testimony unpersuasive. Father has presented no authority that evidence other than Mother's testimony is necessary to sustain the superior court's order, and we have found no such authority. Witnesses other than Mother testified regarding Father's relationship with the child. Father's parole officer testified positively regarding the demeanor of Father and child on the one occasion she saw them together. Father's mother also testified that she had observed Father and the child together and that Father was a good parent and the child loved him. However, the superior court specifically stated that Mother was a credible witness and found her testimony that the child no longer remembered Father credible. The mere fact that the superior court found one witness's testimony credible and persuasive does not mean that the court ignored the rest of the evidence. On this record, the

contention that the superior court considered only Mother's testimony is factually erroneous and legally insignificant.

¶23 A contemplated adoption is not required in order to support a finding of best interests. In violation of ARCAP 13(a)(6), Father has failed to cite any authority supporting his contention that the unavailability of an adoptive parent thwarts a best interest finding. Although we have discretion to treat this failure as a waiver, *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994), we decline to do so because this is a termination case.

¶24 The rule on best interests is generally that termination must benefit the child and that adoption is merely one example of a benefit which a child may obtain. *Bobby G.*, 219 Ariz. at 511, ¶ 15, 200 P.3d at 1008 (citing *Oscar O.*, 209 Ariz. at 334, ¶ 6, 100 P.3d at 945). Although the potential for adoption by a more fit parent is a common example of a benefit to the child supporting a finding that termination is in a child's best interests, this Court has on occasion considered a litany of other factors. *See, e.g.*, *Maricopa County Juv. Action No. JS-9104*, 183 Ariz. 455, 461, 904 P.2d 1279, 1285 (App. 1995) (considering the child's age, present state of bond with parent, mental and emotional makeup, and prospects for adoption) *abrogated on other grounds by Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 (2005); *Pima County Juv. Severance Action No.*

S-113432, 178 Ariz. 288, 293, 872 P.2d 1240, 1245 (App. 1993) (considering father's history of abusive conduct towards mother and children in addition to adoption prospects). In this case, the child's reduced chance of being raised in an environment of fear and domestic violence is a tangible benefit justifying termination.

IV. Father Received Due Process

¶25 Father argues that the superior court violated his due process rights by 1) conducting the examination of Angela Craig in his absence and 2) conducting a large portion of Mother's cross-examination while he was present telephonically.[8] We disagree.

¶26 Father contends that the testimony of Angela Craig was taken without his physical or telephonic presence and over the objection of counsel.[9] We disagree. The transcript demonstrates that counsel waived Father's presence for that particular witness. Defense counsel specifically stated "I wouldn't mind if . . . she testified right now." To clarify, the court asked

[8] Although Father argued below that continuing a termination hearing without him being in the immediate physical presence of his attorney violated his right to counsel, he does not make that contention in his opening brief. Therefore, we deem the issue waived. ARCAP 13(a)(6); *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004).

[9] The particular page and line Father's counsel cites is the court stating that the plan was to have Angela Craig testify without Father's presence. It contains no reference to an objection.

defense counsel whether he was "waiving his [Father's] presence." Father's counsel affirmed that he was waiving Father's presence. Because Father's counsel waived his presence, any right he may have had to be present was terminated. *See State v. Jones*, 197 Ariz. 290, 308, ¶¶ 50-51, 4 P.3d 345, 363 (2000); *State v. Collins*, 133 Ariz. 20, 23, 648 P.2d 135, 138 (App. 1982).

¶27 Father also seems to argue that he has a right to be physically present during all of Mother's cross-examination. We disagree. "[A]ppearance by telephone is an appropriate alternative to personal appearance." *State ex. rel. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997). When deciding how to grant a prisoner access to the courts, the superior court may consider factors such as the possibility of delay and the cost of transportation. *Id.* In this case the superior court determined completely stopping the proceeding until Father could be present physically would create undue delay and that promptly transporting Father to Court was beyond the Sheriff's available manpower that day. The court properly relied on a telephonic appearance to permit Father's participation.

¶28 Father contends that telephonic appearance violated his right "to confront his accuser and witnesses made to testify against him in this particular matter" relying exclusively on

Maricopa County Juv. Action No. JS-7499, 163 Ariz. 153, 786 P.2d 1004 (App. 1989). *JS-7499* held that "[t]he United States and Arizona constitutions guarantee *criminal defendants* the right to confront their accusers. But this right belongs solely to the accused in a criminal prosecution. It has no direct application in proceedings to terminate parental rights, which are essentially civil in nature." *Id.* at 157, 786 P.2d at 1008 (emphasis in original; citation and footnote omitted). Although *JS-7499* does not protect confrontation in a termination proceeding, it does acknowledge that due process generally requires that some form of cross-examination be permitted. *Id.* It expressly approved cross-examination outside the presence of the parties. *Id.* at 157-58, 786 P.2d at 1008-09 (quoting *Maricopa County Juv. Action No. JD-561*, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981). Father cross-examined Mother through counsel and received all the rights acknowledged in *JS-7499*.

CONCLUSION

¶29 For the foregoing reasons, we affirm the order of the superior court terminating Father's parental rights.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Presiding Judge

/s/
PETER B. SWANN, Judge