

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



DIVISION ONE
FILED: 08/24/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PENELOPE D.,) 1 CA-JV 10-0025
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G), Ariz. R.P. Juv. Ct.
SECURITY, DONALD D.,) Rule 28 ARCAP)
)
Appellees.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD15292

The Honorable Aimee L. Anderson, Judge

AFFIRMED

Bruce Peterson, Maricopa County Legal Advocate Phoenix
by William W. Owsley, Deputy Legal Advocate
Guardian ad Litem for the Minor Child

P O R T L E Y, Judge

¶1 We are asked to decide whether the juvenile court erred when it ruled that the parental rights of Donald D. ("Father") could not be terminated pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (Supp. 2009) because he

was not incarcerated at the time of trial. We agree with the juvenile court, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 Child Protective Services ("CPS") removed the eleven-month-old child from her mother's care on November 3, 2006, after mother was arrested for child abuse. Father was in prison at the time of removal. Arizona Department of Economic Security ("ADES") filed a dependency petition on November 8, 2006, and the child was found dependent as to her mother on November 15, 2006.

¶13 Although Father was unaware of the mother's pregnancy at the time he was sent to prison,¹ he was made aware of the child's birth and was listed on the birth certificate. After Father was served, the juvenile court found the child dependent as to him on December 5, 2006.

¶14 The case plan was initially family reunification. Father sent letters to his child, and took parenting and related classes in prison. Father also had four to five visits with the child between February 2008 and his release from prison in May 2009.

¶15 At a September 16, 2008 permanency hearing, after efforts to return the child to her mother failed, the juvenile

¹ Father had been convicted of three felony counts of forgery and sentenced to two concurrent five year sentences and three years' probation.

court approved a change in the case plan to severance and adoption. ADES filed a motion to terminate the parent-child relationship a few days later. After outlining the case against the mother, the motion alleged that Father's rights should be terminated because of the length of his incarceration.

¶16 Both parents contested the severance. At the pretrial conference, the case was reassigned to another division, and the trial was scheduled to begin in July 2009. ADES, however, withdrew its motion for severance after Father was released from prison on May 18, 2009, and the trial was vacated without prejudice.

¶17 The child's guardian ad litem ("the GAL") filed a motion to terminate the rights of both parents on July 17, 2009, and the case plan remained severance and adoption. After a contested severance hearing in December 2009, the juvenile court found there was no statutory ground for severance as to Father, and denied the motion for termination.² The GAL appealed, and we have jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1), and -2101(B) (2003).

² The mother's rights were subsequently terminated. She appealed, but the appeal was dismissed after her appellate counsel indicated she found no appealable issues.

DISCUSSION

¶8 The GAL argues that the juvenile court erred in its interpretation of A.R.S. § 8-533(B)(4).³ Specifically, the GAL argues that the court erred when it found that § 8-533(B)(4) did not apply because Father was not incarcerated at the time of the trial.

¶9 "We will not disturb the juvenile court's determination unless reasonable evidence does not support its factual findings." *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7, 225 P.3d 604, 606 (App. 2010). We, however, review a juvenile court's interpretation of a statute de novo. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 508, ¶ 1, 200 P.3d 1003, 1005 (App. 2008). "We interpret statutes to give effect to the legislature's intent. When a statute is clear and unambiguous, we apply its plain language

³ The statute provides:

That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or 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.

§ 8-533(B)(4).

and need not engage in any other means of statutory interpretation." *Kent K. v. Bobby M.*, 210 Ariz. 279, 283, ¶ 14, 110 P.3d 1013, 1017 (2005).

¶10 Pursuant to § 8-533(B)(4), the juvenile court may terminate the parent-child relationship when "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." The key, as the juvenile court determined, is whether the length of incarceration is of such length that "the child *will be* deprived of a normal home." ⁴ § 8-533(B)(4) (emphasis added).

¶11 The phrase "will be deprived" is not defined in statute and has not been defined by case law in circumstances similar to those the juvenile court examined. The plain language of the phrase "will be deprived" means an examination of the situation currently and into the future. "Will" is a verb "used to express futurity." Webster's Ninth New Collegiate Dictionary 1350 (1990). As a result, the juvenile court found that because the statute was "clear and undisputed," it could

⁴ Generally, before a parent's rights are terminated based on the length of incarceration, the juvenile court should examine the factors outlined in *Michael J. v. Arizona Department of Economic Security*, which includes the total length of time incarcerated. 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000). The *Michael J.* factors, however, are inapplicable here because the statutory basis to terminate parental rights for felony length of incarceration does not apply to this case.

not terminate Father's parental rights unless he was incarcerated at the time of the hearing and into the future.

¶12 The GAL argues, however, that in *Jesus M. v. Arizona Department of Economic Security*, we found that the phrase "will be deprived" was intended to "encompass the entire period of the parent's incarceration and absence from the home." 203 Ariz. 278, 281, ¶ 8, 53 P.3d 203, 206 (App. 2002). Based on the language, the GAL argues the parent does not need to be incarcerated at the time of trial if the total length of incarceration has deprived the child of a normal home.

¶13 *Jesus M.* is inapplicable here. There, the parent was incarcerated at the time of the severance trial and had approximately another sixteen to twenty-six months to serve. *Jesus M.*, 203 Ariz. at 281, ¶ 7, 53 P.3d at 206. We stated that "[w]hat matters" is not the "time that may elapse between the conclusion of [the] legal proceedings for severance and the parent's release from prison." *Id.* at ¶ 8. Indeed, when a parent is in prison the total amount of time is important, not just the prison time left at the conclusion of the trial. *Id.* at ¶¶ 7-8. As a result, we concluded that, when a parent is in prison, the legislature intends "will be deprived" to mean "will have been deprived." *Id.* at ¶ 8.

¶14 Other jurisdictions have also interpreted the words "will be deprived" to indicate a future tense. In the case *In*

re *D.B.*, the Utah court of appeals interpreted the statutory phrase "the sentence is of such length that the child will be deprived of a normal home for more than one year." 57 P.3d 1102, 1104, ¶¶ 8, 10 (Utah Ct. App. 2002). The court found the plain language of the statute "does not allow for termination of parental rights based on" incarceration alone. *Id.* at ¶ 10. The court found that the statutory phrase "allows for termination of parental rights . . . [when] a child . . . will continue to be 'deprived of a normal home.'" *Id.* (emphasis added).

¶15 In the case *In re Neal*, the Michigan Court of Appeals had to interpret the statutory phrase, "if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years." 414 N.W.2d 916, 918 (Mich. Ct. App. 1987). The court found the sole focus of the phrase was "whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home." *Id.* Because the legislature used a verb that indicates the future, and did not use the past tense, the legislature did not intend to sever parental rights based on past sentences of incarceration.

¶16 Here, Father was not in prison at the time of the severance trial. He had been released approximately six months

earlier. Since his release, he had continued, on a more regular basis, visits with the child that started when he was in prison. Unlike *Jesus M.*, Father at the time of trial was not absent from the child's life nor would he be in the foreseeable future. Consequently, the phrase "will be deprived" was not applicable to the facts of this case at the time of trial.

¶17 Accordingly, we agree with the juvenile court that the statutory ground of felony length of incarceration did not apply to Father because he was no longer incarcerated, and thus, the court did not err.

CONCLUSION

¶18 Based on the foregoing, we affirm the juvenile court's denial of termination of Father's parental rights.

/s/

MAURICE PORTLEY, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge