

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 11-02-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

MICHAEL F.,) No. 1 CA-JV 10-0127
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R. P. Juv. Ct. 88(G);
SECURITY, DANIEL J.,) ARCAP 28)
)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD507651

Peter A. Thompson, Judge Pro Tem

AFFIRMED

Robert D. Rosanelli
Attorney for Appellant

Phoenix

Terry Goddard, Attorney General
By Kathleen Skinner, Assistant Attorney General
Attorneys for Appellee

Mesa

W I N T H R O P, Judge

¶1 Michael F. ("Father") appeals from the juvenile court's order of June 8, 2010 terminating his parental rights on grounds of "Length of Incarceration" pursuant to Arizona Revised

Statutes ("A.R.S.") § 8-533(B)(4) (Supp. 2009) and "Abandonment" pursuant to A.R.S. § 8-533(B)(1). Father argues that the court's ruling was clearly erroneous and contrary to the substantial evidence in the record.

FACTS AND PROCEDURAL HISTORY

¶2 On November 16, 2008, Daniela J. ("Mother") gave birth to a child. At the time of the birth, the paternity of the child was unknown. Child Protective Services ("CPS"), a division of the Arizona Department of Economic Security ("ADES"), received a report the day after the child's birth noting that both Mother and child had been exposed to methamphetamines.

¶3 In December, 2008, ADES filed an in-home dependency petition, with Father being served with notice by publication. Though Father voluntarily declined to involve himself in the dependency proceedings or submit to paternity testing, he testified that he made frequent "covert" visits to see the child and also claimed to have purchased diapers and baby wipes for the child and to have given Mother additional support.¹

¹ Father's visits to his child were covert due to the fact that the maternal grandmother, whose house Mother was residing at the time of his visits, had obtained an order of protection against Father due to domestic-violence incidents between he and Mother as well as concerns about Father's "substance abuse and gang activity." Further, given the long history of domestic abuse and continual pattern of Father's involvement in criminal activity during this period of time, the court found Father's

¶4 Despite sporadic attempts by each party to contact the other throughout the dependency proceedings, communications between ADES and Father were not established. Father did not appear at any of the dependency hearings or conferences. Father also did not appear at the team-decision-making meeting wherein ADES determined that Mother refused to participate in any further services with CPS. This led CPS to determine that Mother could no longer care for the child; accordingly, the child was then placed with an "aunt."²

¶5 On April 27, 2009, Father pled guilty to theft of means of transportation, a class three felony. Father's conviction also violated the terms of his probation for past offenses. In May 2009, Father was sentenced to imprisonment for one year for violating the terms of his probation, and also received a concurrent sentence of two and a half years' imprisonment for theft of means of transportation. Father was awarded forty-three days' presentence incarceration credit and is currently scheduled to be released no later than October, 2011. While incarcerated, Father has been cited for three disciplinary infractions, none of which have affected his projected release date.

uncorroborated testimony regarding his interactions with the child and Mother to be unreliable

² The "aunt" is not biologically related to either of the child's parents, but is a close family friend of Mother.

¶6 Though ADES was aware of Father's incarceration as early as April, 2009, it did not contact him until July, 2009. After communications between the parties had been established, Father submitted to paternity testing and the testing established that he was the biological parent of the child. While incarcerated, Father actively participated with ADES in the proceedings involving his child. In December, 2009, the court terminated Mother's parental rights to the child and ordered a subsequent hearing regarding severance of Father's parental rights. Other than paternity testing, ADES did not offer any services to Father during his incarceration. ADES did, however, encourage Father to participate in various services made generally available to prisoners and to notify it of any completed courses. No evidence was presented to suggest that Father enrolled in or completed any of the available services.

¶7 Throughout the duration of his incarceration, Father only sent one letter and one card to the child.³ Though his lawyer during the severance proceedings submitted a single request for visitation on Father's behalf, no visitation between Father and child was ever arranged.

³ Father claims that he sent correspondence directly to his child through addresses furnished by Mother. None of these alleged letters or cards were offered or entered into evidence at trial.

¶8 On June 8, 2010, the court made the following findings: that by clear and convincing evidence that Father has a prolonged history of domestic violence and a history of criminal activity; that once released, Father would need to participate in a minimum of one years' worth of services before he could establish a safe, stable environment for his child; and that a preponderance of the evidence showed that termination of Father's parental rights would be in the child's best interests. Accordingly, the court terminated Father's parental rights pursuant to A.R.S. § 8-533(B)(1) and (B)(4).⁴

¶9 The child continues to reside with the "aunt," and the "aunt" has demonstrated a desire to adopt the child.

¶10 Father filed a timely notice of appeal and we have appellate jurisdiction pursuant to A.R.S. § 8-235(A) (2007) and A.R.S. 12-2101(B) (2003).

ANALYSIS

¶11 Father argues that the court's decision to terminate his parental rights under both A.R.S. § 8-533(B)(1) and (B)(4)

⁴ In relevant part, A.R.S. § 8-533(B) allows for termination of parental rights if the court finds such termination is in the child's best interest and:

"1. That the parent has abandoned the child."

"4. That 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."

was clearly erroneous and contrary to the substantial evidence in the record.

¶12 The right to custody of one's children is fundamental, but it is not absolute. See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). "To justify termination of the parent-child relationship, the trial court must find, by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533, and also that termination is in the best interest of the child." *Id.* at 249, ¶ 12, 995 P.2d at 685 (citing A.R.S. § 8-533(B)); see also *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005) (holding that the findings regarding the best interests of the child need only be supported by a preponderance of the evidence). "[T]his court will not reweigh the evidence but will 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) (citation omitted). We will only overturn the court's ruling if "there is no reasonable evidence to support [it]." *Id.*

¶13 Further, "[i]f clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶3, 53 P.3d 203, 205 (App. 2002) (citing *Michael*

J., 196 Ariz. at 251, ¶ 27, 995 P.2d at 687 and *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997)).

¶14 We turn first to the court's order of termination on grounds of abandonment under A.R.S. § 8-533(B)(1). Abandonment is defined as follows:

[T]he failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. 8-531(1) (2007). What is determined to be "reasonable support, regular contact, and normal supervision varies from case to case . . . [and] are questions of fact for resolution by the trial court." *Michael J.*, 196 Ariz. at 250, ¶ 20, 995 P.2d at 686 (quoting *Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 876 P.2d 1121 (1994)). Therefore, we review the evidence "in a light most favorable to affirming" the court. *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 256, ¶ 20, 159 P.3d 562, 566 (App. 2007).

¶15 The court found that Father had failed "to establish . . . a normal parent/child relationship with his [child]," and further, that "[h]is lack of involvement continued throughout his incarceration."

¶16 Father argues that he has no intent to abandon the child, but rather, that his incarceration and the lack of cooperation by ADES in scheduling visitation is directly responsible for the deterioration or lack of relationship with his child. While Father's incarceration may make contact with his child more difficult, "[h]is incarceration alone . . . does not justify a failure to make more than minimal efforts to support and communicate with his child." *Michael J.*, 196 Ariz. at 250, ¶ 21, 995 P.2d at 686. In this case, the court found that Father's attempts to maintain a relationship with or support the child were sorely lacking. Despite his uncorroborated testimony to the contrary, the record shows that, since his incarceration in 2009, Father had only sent a single letter and a single card to the child. Further, Father made only one attempt through his attorney to schedule a visit with the child and he never made any further attempts to actually coordinate such a visit.

¶17 Father argues that any abandonment is due to ADES' failure on its own initiative to schedule visitation and phone calls between he and the child; however, it was Father who failed to request ADES' assistance in these endeavors or to follow up on his attorney's one request for visitation. Though it is true that neither ADES nor CPS took any proactive steps to schedule visitation between Father and the child, Father

presented no evidence that ADES or CPS prevented him from continuing to pursue the scheduling of such visits. See *Michael J.*, 196 Ariz. at 350-51, ¶¶ 23-25, 995 P.2d at 686-87 (holding that "ADES owe[s] no duty to [parent] to ensure that his parental rights [are] not severed. The burden to act as a parent rests with the parent, who should assert his legal rights at the first and every opportunity," and finding that the incarcerated parent abandoned his child by sending only one letter to his child, failing to participate in dependency hearings, and failing to inquire about his child or seek visitation or phone calls with his child); see also *Action No. S-114487*, 179 Ariz. at 94, 876 P.2d at 1129 (finding that "[w]hile the state may not unduly interfere with an unwed father's ability to develop [the] relationship, it need not protect the mere biological link that exists if the father fails to step forward"). Like the parent in *Michael J.*, Father failed to pursue the options available to him while incarcerated to foster his parent-child relationship, and the court found that his actions constituted abandonment. On this record, we cannot conclude that the court erred in holding that Father has failed to provide reasonable support or maintain regular contact with the child while incarcerated.

¶18 Nonetheless, "[i]mprisonment, per se, neither 'provide[s] a legal defense to a claim of abandonment' nor alone

justifies severance on the grounds of abandonment," and we must also review the court's findings regarding Father's relationship with the child pre-incarceration. *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686.

¶19 In a termination proceeding, the court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 376, ¶ 13, 231 P.3d 377, 380 (App. 2010) (quoting *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205). The court found Father's testimony concerning his pre-existing parent-child relationship to be unreliable and "directly contradicted by the record." The court also found that Father's lifestyle and failure to "participate in the dependency, [to] hide from CPS and [to] continue his criminal lifestyle deprived his child of support, communication and supervision from him." Based on the substantial record detailing Father's criminal history, the lack of corroborating evidence to support Father's testimony, and Father's failure to participate in any of the proceedings held by ADES before his incarceration, we do not find that the court clearly erred in determining that Father failed to create a relationship with the child. Agreeing with the findings made by the court, we conclude that the court properly found that Father abandoned the child in accordance with A.R.S. § 8-533(B)(1).

¶20 Because we affirm the trial court's order granting severance on the basis of abandonment, we need not review the court's findings regarding severance pursuant to A.R.S. § 8-533(B)(4).

¶21 We also do not find any error in the court's holding that termination of Father's parental rights are in the child's best interest.

CONCLUSION

¶22 For the aforementioned reasons, we affirm the juvenile court's order terminating Father's parental rights.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge