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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LARRY T. JR., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and LARRY T. III, Appellees.	2 CA-JV 2011-0043 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD200400050

Honorable Joseph R. Georgini, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Larry T. Jr. appeals from the juvenile court's ruling terminating his parental rights to his son, Larry T. III, born September 14, 2009, pursuant to A.R.S. § 8-533(B)(4), based on Larry Jr.'s incarceration for a felony conviction. Larry Jr. argues on appeal that the refusal by the Arizona Department of Economic Security (ADES) to allow visitation during his incarceration was the reason he was unable to establish a relationship with the child, and that the court therefore erred in terminating his parental rights. He also asserts the court erred in permitting ADES to file an untimely motion to terminate his rights. We affirm.

¶2 "[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court's decision, and we will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶3 Approximately two weeks before Larry III's birth, Larry Jr. was convicted of a felony and sentenced to a 3.5-year prison term, with a release date of February 28, 2012. In March 2010, Child Protective Services (CPS) received information that Larry III's mother, Kristina G., was using methamphetamine and that drugs were being sold out of her home. Kristina initially agreed to participate in services, but soon stopped

participating, tested positive for methamphetamine, and left Larry III with a friend because she feared that CPS "[wa]s going to take [Larry III] from her." CPS took temporary custody of Larry III after being contacted by one of Kristina's friends. ADES filed a dependency petition as to both parents. Larry Jr. did not contest the allegations in that petition, and the juvenile court found Larry III dependent as to both parents. It additionally ordered that the parents' visitation with Larry III would be at ADES's discretion.

¶4 Kristina did not reengage in services and, in October 2010, ADES requested that the juvenile court change the case plan to severance and adoption. The court granted that request and ordered ADES to file a motion to terminate Kristina's and Larry Jr.'s parental rights. ADES did so, alleging as to Larry Jr. that his incarceration for a felony conviction would deprive Larry III "of a normal home for a period of years" and that termination was therefore appropriate pursuant to § 8-533(B)(4). ADES alleged as to Kristina that termination of her parental rights was warranted based on her chronic substance abuse, as well as time-in-care grounds, and that she previously had her parental rights to another child terminated. *See* § 8-533(B)(3), (8)(b), (10).

¶5 ADES, however, did not file the motion to terminate until November 17, 2010—two weeks after the ten-day deadline imposed by the juvenile court and prescribed in Rule 64(A), Ariz. R. P. Juv. Ct. *See also* Ariz. R. P. Juv. Ct. 43; Ariz. R. Civ. P. 6(a). Larry Jr. filed an objection to the petition, arguing it was untimely and therefore should be dismissed, and "ADES should be barred from filing a Motion to Terminate in this

matter." But the court determined that, by filing his objection, Larry Jr. effectively "accept[ed] service" of the termination motion "and waiv[ed] any defects."

¶6 After a two-day contested hearing, the juvenile court terminated both Larry Jr.'s and Kristina's parental rights.[1] It found ADES had proven by clear and convincing evidence that Larry Jr.'s felony conviction would deprive Larry III of a normal home for a period of years and, by a preponderance of the evidence, that termination was in Larry III's best interests. *See* § 8-533(B)(4). The court noted Larry Jr. had no relationship with his son "because of [his] incarceration at the time of his son's birth," and "no other parent [is] available to provide a normal home for [Larry III]."

¶7 On appeal, Larry Jr. contends the juvenile court erred in terminating his parental rights based on his incarceration because his "failure to maintain a relationship with [Larry III] while incarcerated was due to ADES'[s] refusal to allow [visitation]." We find this argument unpersuasive for several reasons. First, Larry Jr. cites no authority, and we find none, suggesting ADES's decision not to permit an incarcerated parent visitation with his or her child precludes termination pursuant to § 8-533(B)(4). And, in any event, Larry Jr. does not assert the court erred in giving ADES the discretion to determine visitation, nor does he assert ADES abused that discretion by denying visitation. Moreover, the record demonstrates that Larry Jr. did not request visitation until less than a month before the termination hearing, nearly a month after the state filed a motion to terminate his parental rights and nearly five months after he admitted the

[1]Kristina is not a party to this appeal.

allegations in the dependency petition. Larry Jr. identifies nothing in the record indicating he took any other action to seek visitation with his son.

¶8 Furthermore, whether an incarcerated parent is able to establish or maintain a relationship with his or her child is only one of several factors a juvenile court should consider in evaluating whether termination is warranted under § 8-533(B)(4). A court

> should consider all relevant factors, including, but not limited to: (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. After considering those and other relevant factors, the [juvenile] court can determine whether the sentence is of such a length as to deprive a child of a normal home for a period of years.

Michael J. v. Ariz. Dep't of Econ. Sec., 196 Ariz. 246, ¶ 29, 995 P.2d 682, 687-88 (2000). Larry Jr. does not assert that the other factors listed in *Michael J.* do not support termination here. Finally, to the extent Larry Jr. suggests ADES had a duty to ensure visitation, he is mistaken. *See id.* ¶ 25 (although ADES "'may not unduly interfere with'" parent/child relationship, it owes no duty to ensure parental rights not severed), *quoting In re Pima County Juv. Severance Action No. S-114487*, 179 Ariz. 86, 94, 876 P.2d 1121, 1129 (1994).

¶9 Larry Jr. also asserts the juvenile court erred by allowing ADES's untimely filing of the motion to terminate his parental rights. Although the motion plainly was untimely, *see* Ariz. R. P. Juv. Ct. 64(A), we agree with ADES that any error was harmless. *See Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 22, 118 P.3d 37, 42 (App. 2005) (failure to comply with juvenile procedure rules "does not necessarily require a reversal"; noncompliance instead reviewed for harmless error if objection made below). Thus, reversal is warranted only if the error was "prejudicial to [Larry Jr.'s] substantial rights." *Creach v. Angulo*, 186 Ariz. 548, 550, 925 P.2d 689, 691 (App. 1996). Larry Jr. does not identify on appeal, nor did he below, any substantial right affected by or any prejudice resulting from ADES's late filing.

¶10 For the reasons stated, we affirm the juvenile court's order terminating Larry Jr.'s parental rights.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge