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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: 10/17/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

Brian O.,) 1 CA-JV 13-0107
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct.
SECURITY, G.O., F.O., B.O.,) 103(G); ARCAP 28)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD21172

The Honorable Aimee L. Anderson, Judge

AFFIRMED

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Scottsdale

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W I N T H R O P, Presiding Judge

¶1 Brian O. ("Father") appeals the juvenile court's order terminating his parental rights to G.O., F.O., and B.O. ("the Children"). Father argues that reasonable evidence does not support the statutory ground for termination and that

termination was not in the best interests of the Children. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On December 17, 2010, Father was sentenced to five years' incarceration for two counts of attempted sexual assault and one count of kidnapping. Kassandra O. ("Mother") was sentenced on October 4, 2011 to eight months' incarceration for using drugs in violation of probation for a 2008 conviction for domestic violence. Both criminal offenses stemmed from domestic violence against each other. As a result of Mother's arrest and Father's incarceration, the Children lived with their paternal aunt and uncle beginning in September 2011.¹ On December 15, 2011, the guardian ad litem for the Children filed a dependency petition alleging that the Children were dependent as to Father and Mother.²

¶3 On January 5, 2012, at the initial dependency hearing, the juvenile court found the Children dependent as to Father and ratified a family reunification case plan, concurrent with an

¹ In November 2012, after a charge of domestic violence between paternal aunt and uncle, ADES removed the Children and placed them in separate foster homes.

² The Arizona Department of Economic Security ("ADES") later substituted as petitioner for the guardian ad litem.

alternative case plan of severance and adoption.³ On September 24, 2012, ADES moved to terminate Father's parental rights because of his five-year incarceration and in the best interests of the Children, pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (West 2013).⁴ A three-day termination hearing began on March 26, 2013. ADES entered into evidence Father's criminal records, including a conviction for criminal damage related to domestic violence and possession of marijuana in 2006, and his current conviction and five-year incarceration for attempted sexual assault and kidnapping. Mother provided extensive testimony about Father's history of drug abuse and domestic violence, although she testified that the drug use was not constant. Father also provided testimony about his illicit drug use and his sexual assault against Mother. The CPS case manager testified that the Children never had a safe home environment as a result of drug abuse and domestic violence, Father's felony conviction deprived the Children of a normal home for a period of years, and termination of parental rights would be in the best interests of the Children. The case manager also testified that relative placement was available for

³ The juvenile court later found the Children dependent as to Mother on April 19, 2012.

⁴ We cite the current versions of the relevant statutes, unless otherwise noted, because no revisions material to this decision have since occurred.

the Children and that in the alternative the Children were adoptable. At the conclusion of the hearing, the juvenile court terminated Father's parental rights to the Children, finding that ADES proved the statutory ground of incarceration under the *Michael J.* factors⁵ and that termination of parental rights was in the best interests of the Children.

¶4 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, A.R.S. § 8-235(A), and Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court. Although Father filed his notice of appeal prior the juvenile court filing a signed order finalizing its bench ruling of termination, we maintain jurisdiction. See *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981) ("[A] premature appeal from a minute entry order in which no appellee was prejudiced and in which a subsequent final judgment was entered over which jurisdiction may be exercised need not be dismissed.").

ANALYSIS

¶5 Father argues that the juvenile court erred when it terminated his parental rights to the Children because of his incarceration for five years. We disagree.

⁵ See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000).

¶6 Because "the juvenile court [is] in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings," *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987), we will not disturb the juvenile court's order severing parental rights unless its findings are clearly erroneous, meaning no reasonable evidence supports them. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). To terminate parental rights pursuant to A.R.S. § 8-533(B)(4), a juvenile court must find, by clear and convincing evidence, "[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); see also *Michael J.*, 196 Ariz. at 249, ¶ 12, 995 P.2d at 685. The court also must find, by a preponderance of the evidence, that termination is in the best interest of the child. *Id.*

A. Termination Pursuant to A.R.S. § 8-533(B)(4)

¶7 Under A.R.S. § 8-533(B)(4), a criminal sentence for a period of years is not *per se* grounds for termination. *Michael J.*, 196 Ariz. at 250, ¶ 22, 995 P.2d at 686. In *Michael J.*, our supreme court provided a non-exhaustive list of factors for the trial court to consider:

(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., 196 Ariz. at 251-52, ¶ 29, 995 P.2d at 687-88.

¶8 Father argues that the juvenile court erred because the *Michael J.* factors weigh in favor of his continued parental rights. We disagree. As a preliminary matter, Father's contention that the Children will not be deprived of a normal home for a period of years because his anticipated release date is less than one year from the termination hearing is inapposite. "What matters to a dependent child is the total length of time the parent is absent from the family, not the more random time that may elapse between the conclusion of legal proceedings for severance and the parent's release from prison." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 281, ¶ 8, 53 P.3d 203, 206 (App. 2002). Thus, the juvenile court properly considered Father's entire five-year period of incarceration.

¶9 At the termination hearing, ADES presented the testimony of Father, Mother, and the CPS case manager about the home life of the Children prior to and during Father's incarceration. Relying primarily on the testimony of the

parents and the exhibits presented at the hearing detailing Father's arrest, the trial court found substantial evidence to terminate Father's parental rights. The court found that the length and strength of the parent-child relationship existing when Father's incarceration began was not strong, given Father's history of domestic violence and drug abuse. In particular, the court noted Father's pervasive drug use during the youngest child's first year of life even though voluntary services through CPS were in place. Although Father testified that he met twice a month with the Children while incarcerated, the trial court found "[t]hat's a visit. That's not a normal parental relationship." Moreover, because of Mother's incarceration and termination of parental rights, the trial court found that another parent was not available to provide a normal home life during Father's incarceration. Mother and Father's own testimony and Father's sentence therefore provides reasonable evidence to support the trial court's findings that ADES produced evidence to satisfy the *Michael J.* factors, and we affirm.

B. Best Interests

¶10 Father also argues that severing his parental rights is not in the best interests of the Children. To effectuate severance, the court must find, by a preponderance of the evidence, that termination is in the children's best interests.

A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). “[A] determination of the [children’s] best interest must include a finding as to how the child[ren] would benefit from a severance or be harmed by the continuation of the relationship.” *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). “Factors considered are whether: 1) an adoptive placement is immediately available; 2) the existing placement is meeting the needs of the child; and 3) the children are adoptable.” *Raymond F. v. Ariz. Dep’t of Econ. Sec.*, 224 Ariz. 373, 379, ¶ 30, 231 P.3d 377, 383 (App. 2010) (citations omitted).

¶11 Considering the harm to the Children by the continuation of Father’s parental rights, the trial court found that “it would be absolutely detrimental to these children to have a parent-child relationship with” Father. The court based its findings on the history of drug abuse, domestic violence, and sexual violence in the household. Father testified about his history of drug abuse and the sexual assault against Mother that triggered his incarceration. Father admitted that he assaulted Mother and that the crime took place with the Children in the home. Mother also extensively testified about Father’s drug use and the recurring history of domestic violence between her and Father. Furthermore, the CPS case manager testified and the court found that the Children were adoptable and that the

paternal grandparents were interested in adopting them. Based on these findings and the record as a whole, the juvenile court thus found that the Children would benefit from severance.

CONCLUSION

¶12 Because reasonable evidence supports the findings of the juvenile court, we affirm the decision to terminate Father's parental rights.

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

CONCURRING:

_____/S/_____
MARGARET H. DOWNIE, Judge

_____/S/_____
JON W. THOMPSON, Judge