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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

PATRICK L., *Appellant,*

v.

DEPARTMENT OF CHILD SAFETY, J.L., *Appellees.*

No. 1 CA-JV 15-0407
FILED 6-7-2016

Appeal from the Superior Court in Maricopa County
No. JD28473
The Honorable Alison Bachus, Judge

AFFIRMED

COUNSEL

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Daniel R. Huff
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding
Judge Margaret H. Downie and Judge Kent E. Cattani joined.

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K E S S L E R, Judge:

¶1 Patrick L. (“Father”) appeals the juvenile court’s order severing his parental rights to his daughter, J.L. (“Daughter”). Father asserts there was insufficient evidence to show he abandoned Daughter. For the reasons that follow, we affirm the severance of Father’s parental rights to Daughter.

FACTUAL AND PROCEDURAL HISTORY

¶2 Daughter, born April 5, 2009, is the biological child of Father and J.C. (“Mother”), who are unmarried parents. Mother has two other children, A.B. and L.B. Jr., with another father, L.B. Mother and the two other children are not parties to this appeal.

¶3 Father admitted he was not present for Daughter’s birth and did not parent her for the first nine months to a year of her life because Mother had moved to Mexico. He stated that Mother and Daughter returned from Mexico in 2010, and that he parented Daughter in his mother’s home from 2010 to 2011. Father, however, also stated that he was sentenced to the Arizona Department of Corrections (“ADC”) for a probation violation in May 2010.

¶4 Father testified he parented Daughter with Mother from 2011 until he was arrested for burglary in December 2012. He said Mother brought Daughter to visit him while he was in jail, but that he last saw Daughter in June 2013 when he was sentenced to three years’ imprisonment on that burglary charge. Father had no contact with Daughter from June 2013 through May 26, 2014 when the Department of Child Safety (“DCS”)¹ became involved.

¶5 In May 2014, DCS learned that Mother left Daughter and her two siblings with their maternal great aunt and had neither maintained contact with the aunt nor returned for the children in several months. When the aunt was discovered deceased in the home, DCS took temporary custody of the three children and filed a petition alleging that Daughter was dependent as to Father.

¹ Pursuant to S.B. 1001, Section 157, 51st Leg., 2d Spec. Sess. (Ariz. 2014) (enacted), the DCS is substituted for the Arizona Department of Economic Security (“ADES”) in this matter. *See* ARCAP 27. For simplicity, our references to DCS in this decision encompass both ADES and the former CPS.

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¶6 Father testified that at the time DCS became involved, he did not know the condition Daughter was in, but he believed she was in Washington with Mother. Father also claimed that, upon being notified of the dependency petition, he made multiple attempts to get in contact with Daughter and DCS, but the case manager was unresponsive. Father, however, provided no proof of such attempts to contact either DCS or Daughter. Daughter was found dependent as to Father in September 2014.

¶7 DCS filed a motion for termination of parent-child relationship on April 6, 2015. DCS sought termination of Father's parental rights on two grounds: (1) abandonment pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-531(1) (Supp. 2015) and -533(B)(1) (Supp. 2015), and (2) the length of Father's incarceration pursuant to A.R.S. § 8-533(B)(4).²

¶8 Upon release from prison on July 23, 2015, DCS denied Father's request for therapeutic visitations with Daughter due to the terms of his release, which barred him from having contact with minors unless approved by his parole officer.³

¶9 Father wrote four letters to Daughter between the spring of 2015, when he received her address, and his release from incarceration in July 2015. The DCS case manager testified that Daughter did not respond because she did not know Father. Father did not provide Daughter with financial support, even though he acquired full time employment shortly after his July 2015 release from prison.

¶10 A severance trial was conducted in November 2015. At the time of trial, Daughter resided in a placement with her two other siblings. The juvenile court severed Father's parental rights to Daughter on the statutory ground of abandonment. The trial court concluded that Father abandoned Daughter while he was in prison and that his alleged attempts

² We cite to the current version of the relevant statutes unless revisions material to this decision have occurred.

³ Father's testimony clarifies that the "no contact with minors" term was related to his release from prison. He additionally testified that this restriction would end December 25, 2015. However, at the time of the severance trial, Father's supervising officer suggested that Father seek counselling prior to having visitations with Daughter. As of the severance hearing, DCS had not provided Father with the recommended counseling services.

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to contact Daughter failed to rebut the presumption of abandonment. Father timely appealed.

JURISDICTION AND STANDARD OF REVIEW

¶11 This Court has jurisdiction pursuant to A.R.S. §§ 8-235(A) (2014), 12-120.21(A)(1) (2016), and -2101(A)(1) (Supp. 2015). In reviewing a severance order, we view the evidence in the light most favorable to sustaining the order. *See Maricopa Cty. Juv. Action No. JS-8490*, 179 Ariz. 102, 106 (1994). “[T]he juvenile court was in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings.” *Pima Cty. Dependency Action No. 93511*, 154 Ariz. 543, 546 (App. 1987). Accordingly, we do not reweigh the evidence but determine only whether there is evidence to sustain the juvenile court’s ruling. *Maricopa Cty. Juv. Action No. JV-132905*, 186 Ariz. 607, 609 (App. 1996). “[W]e will affirm a severance order unless it is clearly erroneous,” and “we will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

DISCUSSION

¶12 “Severance of parental rights necessarily involves the consideration of fundamental, often competing, interests of parent and child.” *Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, 248, ¶ 11 (2000). “[The Arizona Supreme Court] and the United States Supreme Court have long recognized that the right to the control and custody of one’s children is a fundamental one.” *In re Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4 (1990). “[T]his fundamental right ‘does not evaporate simply because’ the natural parents ‘have not been model parents or have lost temporary custody of their child to the state.’” *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

¶13 However, although the right to custody of one’s child is fundamental, it is not absolute. *Michael J.*, 196 Ariz. at 248, ¶ 12. The State can terminate parental rights under the circumstances and procedures specified by A.R.S. § 8-533. *Id.* at 249, ¶ 12. Under that statute, a juvenile court must find, by clear and convincing evidence, at least one statutory basis for termination to justify termination of parental rights. *Id.* The court must also find by a preponderance of the evidence that the termination is in the child’s best interest. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005).

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¶14 Father argues only that there was insufficient evidence of abandonment, and does not contest the court's best interest finding. Accordingly, we solely address the issue of abandonment.

¶15 Section 8-531(1) defines abandonment to mean:

the 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). There is no bright line formula for determining whether a parent has abandoned an existing relationship or failed to establish a relationship with a child. *See In re Pima Cty. Juv. Action No. S-624*, 126 Ariz. 488, 490 (1980) ("The term 'abandon' must be somewhat elastic . . ."). Whether a parent has abandoned a child is a "question[] of fact for resolution by the trial court," and is determined by the parent's conduct. *Michael J.*, 196 Ariz. at 249-50, ¶¶ 18, 20. "What constitutes reasonable support, regular contact, and normal supervision varies from case to case." *In re Pima Cty. Juv. Action No. S-114487*, 179 Ariz. 86, 96 (1994).

¶16 Reasonable evidence supports the juvenile court's findings that Father failed to maintain regular contact with Daughter or a normal parent-child relationship without just cause for a period of at least six months while he was incarcerated. Reasonable evidence additionally supports the court's findings that Father failed to make more than minimal efforts to communicate with Daughter, and failed to provide support without just cause.

¶17 While Father's incarceration does affect the trial court's abandonment analysis, his incarceration alone provides neither a per se defense nor justification for termination. *Michael J.*, 196 Ariz. at 250, ¶¶ 21-22 (quoting *S-624*, 126 Ariz. at 490). Father's incarceration is only one factor to be considered among others in evaluating his ability to fulfill his parental obligations. *Id.*

¶18 In spite of Father's incarceration, he was required to act persistently to establish and maintain a relationship with Daughter. *See S-114487*, 179 Ariz. at 97 (stating that when "circumstances prevent . . . the father from exercising traditional methods of bonding with his child, he

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must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary”). However, according to Father’s own testimony, he last saw his Daughter when she was four years old, when he was sentenced to prison in June 2013. At the time of the severance trial, Daughter was six.

¶19 Moreover, although Father testified that during his incarceration he made multiple attempts through ADC to contact Daughter and DCS, the court found and the record showed that Father provided no documentation to support his attempts to contact them. When questioned about documentation of his attempts to contact, Father asserted that ADC did not provide him with the records upon request. At trial, Father did not subpoena those records or the ADC employees through which he allegedly attempted to make contact. It is up to the trial court to determine a witness’s credibility. 93511, 154 Ariz. at 546. Thus, based on the lack of evidence supporting Father’s claimed attempts, the juvenile court was reasonable in concluding that Father had abandoned Daughter before his release from prison in July 2015.

¶20 The record also supports the juvenile court’s conclusion that Father’s four letters and conduct after his release from prison did not rebut the presumption of abandonment. Even though it is unclear how much of Father’s failure to have more written communication with Daughter may be attributed to DCS’s own inaction, the juvenile court did not abuse its discretion in making its conclusion. The juvenile court’s conclusion was reasonable given the gap between Father receiving Daughter’s mailing address in spring of 2015 and the severance hearing in November 2015, during which time he made no attempt to contact Daughter other than the four letters sent prior to his July 2015 release. If Father concluded that DCS was interfering with his requests to contact Daughter, he could and should have sought judicial relief while he was incarcerated.⁴

¶21 Further, as noted above, Father failed to provide financial support to Daughter despite the ability to do so after his release from prison. Father’s failure to provide for Daughter, however minimal it might have been, is another factor that justifies the juvenile court’s conclusion that he abandoned Daughter. While the court only directly mentioned Father’s

⁴ We note that the juvenile court properly took into account that Father could not have direct contact with Daughter after his release from prison because of the no-contact term of his probation. However, there is no evidence Father sought to send further letters to Daughter after his release.

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failure to provide support while he was in prison, we will imply any findings supported by the record to affirm the court's ruling provided they do not conflict with any express findings. *Kathryn H. v. Dep't of Child Safety*, 1 CA-JV 15-0271, 2016 WL 1168252, at *7, ¶ 26 (Ariz. App. Mar. 24, 2016) (mem. decision). Here, there was evidence Father had a full time job after his release from prison, but offered no support for Daughter.

¶22 Under these circumstances, we find no abuse of discretion. As noted above, there is no bright line formula for determining abandonment; whether there has been abandonment is a question of fact to be determined by the trial court. See *S-114487*, 179 Ariz. at 96. Further, the clear and convincing evidence standard merely requires a showing that the grounds for termination are "highly probable or reasonably certain." See *Kent K.*, 210 Ariz. at 284-85, ¶ 25. Based on the facts of this case, we hold that the juvenile court's finding of abandonment was supported by clear and convincing evidence.

CONCLUSION

¶23 For the foregoing reasons, we affirm the juvenile court's termination of Father's parental rights to Daughter pursuant to A.R.S. § 8-531(1).



Ruth A. Willingham · Clerk of the Court
FILED : AA