

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

SOLOMON S., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.S., *Appellees*.

No. 1 CA-JV 17-0539
FILED 4-26-2018

Appeal from the Superior Court in Maricopa County
No. JD29955
The Honorable Kerstin G. LeMaire, Judge

AFFIRMED

COUNSEL

John L. Popilek, P.C., Scottsdale
By John L. Popilek
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Solomon S. (“Father”) appeals a superior court order terminating his parental rights to his son S.S. under Arizona Revised Statutes (“A.R.S.”) section 8-533(B)(1). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Father is the biological parent of S.S., born in June 2009. Father moved with S.S. from Delaware to Arizona to live with Mother in 2013. In May 2014, Father was arrested on two counts of attempted second-degree murder, two counts of aggravated assault, one count of disorderly conduct, and one count of discharging a firearm at a residential structure. Father pled guilty to one count of discharging a firearm at a residential structure and was sentenced to five years’ imprisonment.

¶3 The Department of Child Safety (“DCS”) took temporary custody of S.S. in February 2015 while Father was incarcerated.¹ Father stipulated to S.S.’s dependency in June 2015. During his incarceration, Father sent S.S. some letters and birthday cards but had no physical or phone contact. DCS moved to sever Father’s parental rights in September 2016, alleging abandonment under A.R.S. § 8-533(B)(1). After a contested severance hearing, the superior court terminated Father’s parental rights and this timely appeal followed.

DISCUSSION

¶4 The superior court may terminate a parent’s rights under A.R.S. § 8-533(B)(1) if the parent has failed to provide reasonable support, maintain regular contact, or maintain a normal parental relationship. A.R.S.

¹ Alice P. (“Mother”) voluntarily contacted DCS because she felt she could no longer care for S.S. Her parental rights to S.S. were severed and she is not a party to this appeal.

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§ 8-531(1). Failure to maintain a normal parental relationship for a period of six months is considered *prima facie* evidence of abandonment. *Id.* “What constitutes reasonable support, regular contact, and normal supervision varies from case to case,” and is measured by a parent’s past conduct, not their subjective intent. *Michael J. v. ADES*, 196 Ariz. 246, 249–50, ¶¶ 18, 20 (2000). “Imprisonment, per se, neither ‘provide[s] a legal defense to a claim of abandonment’ nor alone justifies severance on the grounds of abandonment.” *Id.* at 250, ¶ 22 (alteration in original) (quoting *Pima County Juv. Action No. S-624*, 126 Ariz. 488, 490 (App. 1980)).

¶5 As the trier of fact, the superior court “is in the best position to weigh the evidence, observe the parties, judge the credibility of the witnesses, and resolve disputed facts.” *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). Therefore, we view the facts in the light most favorable to affirming the superior court’s order “unless no reasonable evidence supports those findings.” *Jennifer B. v. ADES*, 189 Ariz. 553, 555 (App. 1997); see also *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4 (1990) (“[Q]uestions of abandonment . . . are questions of fact for resolution by the trial court.”).

¶6 Father argues the superior court erred by terminating his parental rights to S.S. on the grounds of abandonment because his “imminent” pending release from prison is set for June 2018. However, the superior court correctly considered Father’s circumstances at the time of the severance hearing. See *Marina P. v. ADES*, 214 Ariz. 326, 330, ¶ 22 (App. 2007). At the time of the contested severance hearing in September 2017, Father had not yet been sentenced after accepting his plea agreement. Under the terms of the plea agreement, Father faced a minimum sentence of three years and a maximum sentence of five years. While there was a possibility he could be released shortly after the hearing if he was sentenced to the minimum three years, he also faced a possible five-year sentence.² Furthermore, what sentence Father would actually receive was irrelevant in resolving the claim of abandonment. See A.R.S. §§ 8-533(B)(1), -531(1) (defining abandonment as “the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision”); cf. *Jeffrey P. v. DCS*, 239 Ariz. 212, 214, ¶ 8 (App. 2016)

² Pursuant to the superior court records, Father was sentenced to five-years’ imprisonment on October 4, 2017. See *State v. Valenzuela*, 109 Ariz. 109, 110 (1973) (appellate courts may take judicial notice of superior court records).

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(discussing consideration of pending release when parent's rights are terminated under § 8-533(B)(4)).

¶7 Father incorrectly cites to a set of factors listed in *Michael J.*, 196 Ariz. at 251-52, ¶ 29. The six-factor test quoted in Father's opening brief applies under the termination ground of length of sentence for a felony conviction under A.R.S. § 8-533(B)(4). Father's parental rights were terminated based on abandonment as set forth in § 8-533(B)(1). Accordingly, those factors are not relevant.

¶8 Furthermore, sufficient evidence supported the superior court's finding of abandonment. During his incarceration, Father had no physical or phone contact with S.S., failed to maintain regular contact, or provide any support to S.S. Father sent so few cards over the course of his lengthy incarceration and had such little contact that DCS was instructed to inform him of S.S.'s interests to allow him to include those topics in his letters. While Father testified that he had bonded with S.S., Dr. Silberman, the psychologist who examined S.S., opined that S.S. was afraid of Father, and diagnosed S.S. with post-traumatic stress, likely associated with Father disciplining him and witnessing Father's arrest.

¶9 We hold the superior court did not abuse its discretion by terminating Father's parental rights to S.S. under § 8-533(B)(1).

CONCLUSION

¶10 Affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA