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See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 06/16/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

TREVOR E.,

Appellant,

v.

APRIL E., WESLEY E.,

Appellees.

No. 1 CA-JV 11-0001

DEPARTMENT E

MEMORANDUM DECISION

(Not for Publication -
Ariz.R.P.Juv.Ct.
103(G); ARCAP 28

Appeal from the Superior Court in Maricopa County

Cause No. JS506608

The Honorable David K. Udall, Judge

AFFIRMED

Vierling Law Offices
By Thomas A. Vierling
Attorney for Appellant Father Trevor E.

Phoenix

Robert D. Rosanelli
Attorney for Appellee Mother April E.

Phoenix

I R V I N E, Presiding Judge

¶1 Trevor E. ("Father") appeals from the juvenile court's order granting summary judgment in favor of April E. ("Mother") terminating his parent-child relationship with their son Wesley pursuant to Arizona Revised Statutes ("A.R.S.") section 8-

533(B)(4) (Supp. 2010), the provision permitting severance based on unfitness to parent or length of sentence due to a felony conviction.¹ For the reasons that follow, we affirm the ruling of the juvenile court.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in a light most favorable to upholding the juvenile court's order. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7, 225 P.3d 604, 606 (App. 2010). Mother and Father were married in 2004, and Wesley was born in June 2006. After Wesley's birth, Mother discovered that Father had been sexually abusing B., Mother's then four-year-old daughter from a prior relationship. Father was charged and ultimately convicted for offenses relating to the sexual abuse of B. As a result, Father was sentenced to fifteen years' imprisonment. Assuming Father is not released early, his release date is in 2021.

¶3 On February 19, 2010, Mother petitioned to terminate Father's parent-child relationship with Wesley based on abandonment. See A.R.S. § 8-533(B)(1). Father contested the severance, and the matter was set for a hearing. Prior to the hearing, Mother filed a motion for summary judgment, arguing

¹ Unless otherwise specified, we cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

that pursuant to A.R.S. § 8-533(B)(4), Father's rights could be severed because Father is incarcerated for fifteen years, such a length will deprive Wesley of a normal home for a period of years, Father is unfit to parent based on the nature of his felony, and termination is in Wesley's best interests. On the same day that Mother filed her motion for summary judgment, she also filed an expedited motion to amend the petition to include the ground of incarceration. See A.R.S. § 8-533(B)(4). The juvenile court granted Mother's motion to amend the petition.

¶4 Father filed a response to Mother's motion for summary judgment. Father did not controvert any facts Mother asserted or provide an affidavit detailing his arguments. Instead, Father's motion focused solely on his assertion that Mother "has failed to show" that he is unfit to parent and that Mother's argument regarding the length of Father's incarceration is "without merit." See A.R.S. § 8-533(B)(4).

¶5 In response to Father's motion, the family court noted that Father "has not contested any of the facts as outlined by [Mother];" the court accepted the facts in Mother's motion because they were uncontroverted. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) (if opponent of summary judgment fails to present facts to controvert the moving party's, moving party's facts may be accepted as true). The family court granted Mother's motion for

summary judgment and terminated Father's parental rights to Wesley. Father timely appealed.

DISCUSSION

Motion for summary judgment

¶16 Father argues that genuine issues of material fact exist as to whether the statutory ground of length of sentence has been met, whether the nature of his felony conviction renders him unfit to parent and whether termination would be in Wesley's best interests.

¶17 In certain cases, termination of parental rights can be resolved by summary judgment. *Kenneth T. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 150, 154, ¶ 24, 128 P.3d 773, 777 (App. 2006). "We review the juvenile court's entry of summary judgment de novo, . . . applying the same standards the trial court should use." *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, 453, ¶ 14, 123 P.3d 186, 189 (App. 2005) (citation omitted). A juvenile court can grant summary judgment only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. See Ariz.R.P.Juv.Ct. 46(D); Ariz.R.Civ.P. 56(c).

¶18 As previously noted, Father filed no separate statement of facts to controvert Mother's, as required by Rule 56(c)(2). Nor did he attach any supporting documentation to his response to Mother's motion. "When the party moving for summary

judgment makes a *prima facie* showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists." *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 14, 17 P.3d 790, 793 (App. 2000); *Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990) ("When a summary judgment movant makes a *prima facie* motion, the opponent cannot defeat the motion merely by asserting facts in a memorandum or brief.").

¶9 To terminate parental rights, the juvenile court must find (1) by clear and convincing evidence, at least one of the statutory grounds set out in A.R.S. § 8-533 and (2) by a preponderance of the evidence, that termination would be in the best interests of the child. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶10 Father first argues that the statutory ground for severance, A.R.S. § 8-533(B)(4), was not properly before the juvenile court. As a result, Father claims that we must reverse the order for severance. In Mother's original petition, she alleged the ground of abandonment. See A.R.S. § 8-533(B)(1). Concurrent with her motion for summary judgment, Mother filed an expedited motion to amend her petition to include the statutory ground of A.R.S. § 8-533(B)(4). The amended petition was

attached to the expedited motion to amend. The juvenile court granted Mother's motion to amend her petition.

¶11 Father has waived this argument as he did not raise it in the juvenile court. *Christy C. v. Ariz. Dep't Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App. 2007). Further, Father advanced arguments in the juvenile court pertaining to A.R.S. § 8-533(B)(4). Although Father notes that Mother did not properly file or serve an amended petition, Father responded to Mother's motion for summary judgment, arguing that severance pursuant to A.R.S. § 8-533(B)(4) was not proper. The juvenile court did not err in considering A.R.S. § 8-533(B)(4) as a statutory ground permitting severance of Father's parental rights.

Section 8-533(B)(4): length of sentence

¶12 The statutory ground of length of sentence permits termination of the parent-child relationship if "the parent is deprived of civil liberties [and] . . . 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). No "bright line" definition exists as to when a sentence will be sufficient to meet this standard. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251, ¶ 29, 995 P.2d 682, 687 (2000). Instead, a juvenile court should consider all relevant factors, including:

(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.

Id. at 251-52, 995 P.2d at 687-88. In its ruling, the court considered all of the factors enumerated in *Michael J. Id.* Father argues that the juvenile court impermissibly weighed evidence and drew inferences regarding the *Michael J.* factors, therefore, summary judgment was not appropriate. Summary judgment is inappropriate if a fact finder must weigh evidence or draw an inference where *competing inferences are possible*. *State v. Comp. Fund v. Yellow Cab Co. of Phoenix*, 197 Ariz. 120, 123, ¶ 11, 3 P.3d 1040, 1043 (App. 1999) (emphasis added). Here, Father provided no facts in his response to controvert those presented by Mother; the juvenile court considered the evidence before it, which consisted of the uncontroverted facts.

¶13 The court found that Wesley was just a few weeks old when Father was incarcerated, there had been no contact between Wesley and Father since Father's incarceration, and "there could have been no parent-child relationship existing due to the

child's age." Next, the court found that the parent-child relationship could not be nurtured because Father was incarcerated for molestation, was not permitted to have contact with children, and Mother refuses to permit contact between Wesley and Father. The court also found that Wesley was four years old, would be fifteen when Father was released, and "that there is no way a normal relationship could be developed." As far as the length of Father's sentence, the court noted Father was serving a fifteen year sentence, which was of "sufficient length" that it would deprive Wesley of a normal home environment. The court found that Mother's current husband, Wesley's stepfather, was willing and able to adopt Wesley, he has a strong bond with Wesley, Wesley believes he is his father, and that he would provide a normal home life for Wesley. Lastly, the court found that removal of Father from Wesley's life "would not have any significant impact" because Wesley does not know Father, has never known Father and has never had contact with Father. The evidence presented to the juvenile court was sufficient to find that the length of Father's incarceration would deprive Wesley of a normal home life for a number of years.

Section 8-533(B)(4): unfit to parent

¶14 Father argues that the juvenile court erred in granting Mother's motion on this basis because "[t]here is

simply no evidence presented or found by the [j]uvenile [c]ourt which would allow the court to find this as a matter of law unless the court weighed the evidence and substituted its judgment for credibility issues." We disagree. The statutory ground of unfitness of a parent to have future custody permits termination of the parent-child relationship if "the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the fitness of that parent to have future custody and control of the child." A.R.S. § 8-533(B)(4).

¶15 Here, Father pled guilty to child molestation and attempted sex conduct with a minor. The juvenile court specifically found that it could not "conceive of a felony conviction that would make a person unfit to parent [more] than those which [Father] has admitted guilt to and been sentenced for." Given the sexual nature of the underlying conduct, the young age of Father's victim and the fact that Father's victim was Mother's child, it was rational to infer that Father was unfit to parent. See *In re Juv. No. J-2255*, 126 Ariz. 144, 146, 613 P.2d 304, 306 (App. 1980) (rejecting appellant's contention that the child must be the victim of the felony to prove unfitness and finding that molestation of his former wife's daughters permitted "a rational inference of unfitness.").

¶16 Based on the above-mentioned evidence, we conclude that sufficient evidence supports the juvenile court's finding that Father's parental rights could be severed due the length of incarceration and unfitness to parent pursuant to A.R.S. § 8-533(B)(4).

Best interests

¶17 To support a finding that termination is in a child's best interests, the petitioner must prove that the child will affirmatively benefit from the termination. *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998). In making the determination, the juvenile court may consider evidence that the child is adoptable or that an existing placement is meeting the needs of the child. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004).

¶18 The juvenile court found that Wesley's step-father wished to adopt him, Wesley thought of him as his Father and Wesley had no contact with Father since his incarceration. Father presented no evidence that termination would not be in Wesley's best interests. Father's only response was that Mother provided no statutory basis as to best interest and that the guardian ad litem's opinion that severance was in Wesley's best interest was insufficient.

