

Appendix A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

JESSIE D.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, F.V., M.D., M.D., C.D.,
Appellees.

No. CV-19-0321-PR
Filed October 8, 2021

Appeal from the Superior Court in Maricopa County
The Honorable Joseph C. Kreamer, Judge
No. JD34609
AFFIRMED

Memorandum Decision of the Court of Appeals, Division One
No. 1 CA-JV 19-0073
Filed November 14, 2019
AFFIRMED

COUNSEL:

Thomas A. Vierling (argued), Vierling Law Offices, Phoenix, Attorney for Jessie D.

Mark Brnovich, Arizona Attorney General, Drew C. Ensign, Section Chief Counsel, Civil Appeals Section, Dawn R. Williams (argued), Toni M. Valadez, Sandra L. Nahigian, Assistant Attorneys General, Phoenix, Attorneys for Department of Child Safety

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Opinion of the Court

JUSTICE BEENE authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, JUSTICE LOPEZ, and JUDGE STARING* joined.** JUSTICE BOLICK concurred in part and in the judgment.

JUSTICE BEENE, Opinion of the Court:

¶1 Under A.R.S. § 8-533(B)(4), a court may terminate a parent-child relationship if the parent is convicted of a felony and the resulting prison sentence "is of such length that the child will be deprived of a normal home for a period of years." In *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, 251-52 ¶ 29 (2000), we set forth the relevant factors a juvenile court should consider in making this determination. Those factors include, but are 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.

* Justice William G. Montgomery has recused himself from this case. Pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Christopher P. Staring, Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.

** Although Justice Andrew W. Gould (Ret.) participated in the oral argument in this case, he retired before issuance of this Opinion and did not take part in its drafting.

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Id. These have come to be known as the "*Michael J.* factors."

¶2 Although the juvenile court misapplied two *Michael J.* factors in this case, substantial evidence exists to support termination. Accordingly, we affirm the court's order terminating the parent-child relationship.

BACKGROUND

¶3 Jessie D. ("Father") and Joana V. ("Mother") had four children together. In August 2016, while Father was living with Mother and the children, their house caught fire, and they became homeless. Mother and the children moved into a homeless shelter, but Father was not permitted to live there due to an outstanding warrant. In December, Father was arrested, and in July 2017, he was convicted of two counts of aggravated driving under the influence and sentenced to seven years' incarceration with a maximum release date of December 2022. At the time of his incarceration, the children ranged in age from 1.5 to 7 years old.

¶4 In August 2017, the Department of Child Safety ("DCS") removed the children from Mother's care because of homelessness, domestic violence, and substance-abuse issues. A month later, the court found the children dependent as to Father.

¶5 In June 2018, DCS moved to terminate Father's parental rights to the children under § 8-533(B)(4).¹ The juvenile court held a termination hearing in November, during which the DCS case manager and Father testified. Following the hearing, the court found by clear and convincing evidence that Father's sentence was of sufficient length to deprive the children of a normal home for a period of years. The court further found that DCS had shown by a preponderance of the evidence that termination of Father's parental rights would be in the children's best interests. Accordingly, the juvenile court terminated Father's rights to the children.

¹ Mother's parental rights have been terminated and she is not a party to this appeal.

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¶6 Father appealed. The court of appeals affirmed the juvenile court's termination. *Jessie D. v. Dep't of Child Safety*, No. 1 CA-JV 19-0073, 2019 WL 6003238, at *1 ¶ 1 (Ariz. App. Nov. 14, 2019) (mem. decision). In conducting its review, the court of appeals analyzed the juvenile court's application of the *Michael J.* factors. *Id.* at *2-3 ¶¶ 6-16. It found that reasonable evidence supported each finding and concluded that the court did not abuse its discretion in evaluating the factors. *Id.* at *3 ¶ 14. The court also concluded that reasonable evidence supported the juvenile court's finding that severance was in the children's best interests. *Id.* at ¶ 19.

¶7 We granted review on the following issues: (1) whether substantial evidence exists in the record to support the juvenile court's finding that Father's conviction and length of sentence of imprisonment was of such a length as to deprive the children of a normal home for a period of years, and (2) whether substantial evidence exists in the record to support the juvenile court's finding that termination of Father's parental rights would be in the children's best interests. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶8 Parents enjoy a fundamental liberty interest in "the care, custody, and management" of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). But this right is not inalienable. *See, e.g., In re Appeal in Maricopa Cnty. Juv. Action No. JD-561*, 131 Ariz. 25, 27-28 (1981) ("The state has a vital interest in the status of the parent-child relationship and, because of the importance of this interest, the state may intrude into the parent-child relationship to protect the welfare of the child and the state's own interest in the welfare of its citizens."). A court may terminate "parental rights under certain circumstances, so long as the parents whose rights are to be severed are provided with 'fundamentally fair procedures' that satisfy due process requirements." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284 ¶ 24 (2005) (quoting *Santosky*, 455 U.S. at 754). "Arizona's severance statute satisfies due process because the statutory grounds are 'synonymous with parental unfitness.'" *Jessica P. v. Dep't of Child Safety*, 249 Ariz. 461, 470 ¶ 31 (App. 2020) (quoting *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 150 ¶ 9 (2018)), *vacated on other grounds by Jessica P. v. Dep't of Child Safety*, CV-20-0241-PR, 2020 WL 8766053, at *1 (Ariz. Dec. 15, 2020). In Arizona, "[t]o justify

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termination of the parent-child relationship, the [juvenile] court must find, by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533, and also that termination is in the best interest of the child." *Michael J.*, 196 Ariz. at 249 ¶ 12.

¶9 As previously indicated, under § 8-533(B)(4), a juvenile court may terminate the parent-child relationship if the parent is convicted of a felony and "the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." "The 'normal home' . . . relates to [Father's] obligation to provide a normal home, a home in which the . . . father has a presence, and it does not refer to a 'normal home' environment created by [others]." *In re Appeal in Maricopa Cnty. Juv. Action No. JS-5609*, 149 Ariz. 573, 575 (App. 1986). There is "no 'bright line' definition of when a sentence is sufficiently long to deprive a child of a normal home for a period of years." *Michael J.*, 196 Ariz. at 251 ¶ 29. Rather, the inquiry is individualized and fact specific. The juvenile court must consider "all relevant factors," including the previously mentioned *Michael J.* factors. *Id.* at 251-52 ¶ 29. Termination, however, may be appropriate even if some of the *Michael J.* factors do not support the severance of parental rights. Indeed, "[a] lack of evidence on one or several of the *Michael J.* factors may or may not require reversal or remand on a severance order." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 450 ¶ 15 (App. 2007).

¶10 We review the court's termination decision for an abuse of discretion and will affirm unless no reasonable evidence supports the court's findings. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47 ¶ 8 (App. 2004). "Because the juvenile court is in the best position to weigh evidence and assess witness credibility, we accept the juvenile court's findings of fact if reasonable evidence and inferences support them, and will affirm a severance order unless it is clearly erroneous." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3 ¶ 9 (2016). However, "we review de novo legal issues requiring the interpretation and application of § 8-533." *Ariz. Dep't of Econ. Sec. v. Rocky J.*, 234 Ariz. 437, 440 ¶ 12 (App. 2014).

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I.

¶11 The first *Michael J.* factor requires a juvenile court to consider "the length and strength of any parent-child relationship existing when incarceration begins." *Michael J.*, 196 Ariz. at 251-52 ¶ 29. When considering the temporal aspect of this factor, the court should take into account the time the parent and child had spent together before incarceration. Additionally, when evaluating the stability of the parent-child relationship, the court should consider whether the parent cared for the child, both physically and financially, and whether the parent resided with the child or regularly visited the child if they did not live together.

¶12 Here, the juvenile court found that the evidence regarding this factor was "limited and conflicting," but concluded that "the relationship was not particularly strong." The court based its decision on the following evidence: (1) Father did not live with the children before his incarceration; (2) Father's description of his relationship with the children before he was incarcerated—taking them to the park, building things with them, and teaching them to draw—suggested that Father was not the "primary caretaker" for the children; (3) Father was absent for a large portion of the lives of two of his children because of incarceration; and (4) the children's apparent lack of interest in their Father since being placed in DCS's care. While we agree with the juvenile court that the evidence regarding this factor was "limited and conflicting"—particularly based on the differing testimony regarding the parent-child bond from Father and the DCS case manager—we conclude that the court misapplied this *Michael J.* factor.

¶13 Although the juvenile court considered the amount of time Father spent with the children before his incarceration and discussed the strength of their relationship, it reasoned that the first *Michael J.* factor was not established because Father "was not a primary caretaker for these children." *Michael J.* does not mandate, and we have never held, that the length and strength of the parent-child relationship hinges on a parent's "primary caretaker" status. A finding that a parent is not the "primary caretaker" does not necessarily mean the parent did not also care for, or establish a bond with, a child. Further, the court incorrectly faulted Father

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for not "actually living with the children" when Father testified that he was not permitted to stay in the homeless shelter with his family, so he slept outside the shelter in his car. The court also wrongly faulted Father for having six other children, which the court found limited Father's time to build relationships with the children at issue here. Parents with a large number of children can still form bonds with those children. Because it is not clear from the court's order that it properly considered the length and strength of the relationship between Father and the children, it misapplied the first *Michael J.* factor.

¶14 The second *Michael J.* factor addresses "the degree to which the parent-child relationship can be continued and nurtured during the incarceration." *Id.* at 252 ¶ 29. In addressing this factor, the juvenile court should "consider not only the parent-child relationship at the time the incarceration commences but also, how and whether that relationship may be maintained during the incarceration." *Jeffrey P. v. Dep't of Child Safety*, 239 Ariz. 212, 215 ¶ 13 (App. 2016).

¶15 Here, the juvenile court found:

[T]he parent-child relationship cannot be meaningfully continued while [F]ather is incarcerated. All four children are very young. . . . The frequent, meaningful contact required for a parent to build and maintain a bond is virtually, if not completely, impossible in a prison setting. Father cannot interact with the children in a home, school or recreational setting. . . . He cannot observe them with friends or in a social setting. He cannot reasonably parent.

¶16 We conclude that the juvenile court misapplied this *Michael J.* factor. The focus of the court's inquiry should be "how and whether" a parental relationship can be maintained during Father's incarceration. *Id.* But the court concluded that the factor was not met because Father was unable to interact with the children in more traditional settings (i.e., home, school, and recreational). While the court is correct that Father will be unable to parent in the conventional manner while incarcerated, its analysis failed to address whether Father's relationship with the children could be

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maintained while he was in prison. For this reason, the juvenile court misapplied the second *Michael J.* factor.

¶17 The juvenile court's rationale and conclusion regarding this factor renders it self-fulfilling and implies that incarcerated parents could never adequately maintain a parent-child relationship with their young children. This implication is contrary to law. As previously stated, maintaining a relationship with one's children while incarcerated would undoubtedly be a difficult task, but an incarcerated parent can maintain a bond with a child in other ways, such as through visits, phone calls, letters, pictures, and gifts. *See Michael J.*, 196 Ariz. at 251 ¶ 24. And it is crucial to remember that parents' right to the custody and control of their children is fundamental and "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky*, 455 U.S. at 753.

¶18 Although § 8-533(B)(4) does not impose an explicit duty on DCS to provide reunification services, the absence of a statutory duty does not obviate the state's obligation to provide these services. Arizona courts have previously recognized a requirement to engage in reunification efforts "on constitutional grounds as a necessary element of any state attempt to overcome . . . the 'fundamental liberty interest of the natural parents in the care, custody and management of their child.'" *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192 ¶ 32 (App. 1999) (quoting *Santosky*, 455 U.S. at 753). Providing reunification services is imperative in severance proceedings because "[t]he combined effect of the fundamental character of a parent's right to his child and the severity and permanence of termination dictates that the court sever the parent-child relationship only in the most extraordinary circumstances, *when all other efforts to preserve the relationship have failed.*" *In re Appeal in Maricopa Cnty. Juv. Action No. JA 33794*, 171 Ariz. 90, 91-92 (App. 1991) (emphasis added).

¶19 Here, the juvenile court correctly relied on existing precedent when it concluded that DCS was not required to provide reunification services to Father. *See James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2 ¶ 6 (App. 2005). However, the rationale for denying incarcerated parents reunification services as expressed in *James H.* is not persuasive. In that

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case, the court of appeals concluded that in the "case of a lengthy prison sentence . . . reunification efforts were not required because prolonged incarceration is something neither [DCS] nor the parent could ameliorate through reunification services." *Id.* at 3 ¶ 9.

¶20 *James H.*'s categorical refusal to provide reunification services to parents serving lengthy sentences is contrary to the well-settled axiom that "severance of the parent-child relationship should be resorted to 'only when concerted effort to preserve the relationship fails.'" *In re Appeal in Maricopa Cnty. Juv. Action No. JS-5209 & No. JS-4963*, 143 Ariz. 178, 189 (App. 1984) (quoting *In re Appeal in Maricopa Cnty. Juv. Action No. S-111*, 25 Ariz. App. 380, 387 (1975), *overruled on other grounds by In re Appeal in Yavapai Cnty. Juv. Action No. J-8545*, 140 Ariz. 10, 14 (1984)). Because parents incarcerated for a lengthy period still possess a fundamental liberty interest in the care, custody, and management of their children, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), DCS must make diligent efforts to preserve the family by providing services to assist parents in maintaining a bond with their children.

¶21 We are mindful that requiring DCS to provide reunification services to an incarcerated parent is a departure from prior Arizona law, although it is a constitutional requirement under *Santosky*. If DCS seeks to terminate parental rights under § 8-533(B)(4)'s provision addressing the parent's length of felony sentence, and an incarcerated parent requests reunification services, such as visitation, and providing the services will not endanger the child, DCS must make reasonable efforts to provide these services. DCS's obligation to provide services to an incarcerated parent is not without limits. It must, however, initiate measures designed to address an incarcerated parent's desire to maintain a parent-child relationship. At bottom, incarceration does not automatically render a parent unfit and DCS "has a responsibility to assist parents, incarcerated or not, who face termination of their rights." *Michael J.*, 196 Ariz. at 253 ¶ 38 (Zlaket, C.J., concurring in part and dissenting in part).

¶22 The juvenile court correctly analyzed and applied the remaining *Michael J.* factors. On the third factor—the age of the child and the relationship between the child's age and the likelihood that

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incarceration will deprive the child of a normal home—reasonable evidence supported the court’s conclusion that given the children’s ages, 1.5 to 7 years old, it was “virtually impossible to maintain anything approaching a normal parent-child relationship.” On the fourth factor—length of sentence—the court correctly considered the total length of Father’s sentence, including time to complete parent aide services, and found that a realistic reunification date would be “mid to late 2023 at the earliest.” This finding was supported by exhibits and testimony taken during the hearing. On the fifth factor—the availability of another parent to provide a normal life—the court properly concluded that another parent is not available because Mother’s rights had been terminated. On the sixth factor—the effect of deprivation of a parental presence—the court appropriately found, based on the testimony provided at the hearing, that the children would “essentially be left adrift if Father’s rights are not severed.”

¶23 Although there was conflicting evidence offered at the termination hearing, we do not reweigh the evidence because the court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334 ¶ 4 (App. 2004). Father asserts that the juvenile court abused its discretion in terminating his parental rights because he was not afforded sufficient time to reunify with the children and was not provided visitation services. The record belies this claim. Father intermittently requested visitation with his children and the court directed DCS to follow up on Father’s request, but he also stated at three separate hearings that he had “no objection” to the court’s finding that DCS had “offered, made referrals, provided, and/or requested” transportation and visitation services for him and the children.

¶24 Notably, Father sent letters to the children and engaged in phone calls that DCS’s psychologist determined were inappropriate based on the substance of the conversations and the children’s undesirable behaviors after communicating with Father. As a result, DCS determined that providing Father’s letters to the children or allowing them to engage in phone calls was not in their best interests. Although DCS should have informed Father about its decision not to forward his letters or allow phone calls with the children so he could have challenged this decision, or written

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additional letters that did not discuss the topics DCS found inappropriate, this omission did not affect the propriety of the court's decision to sever Father's parental rights given the totality of the record.

¶25 Here, the juvenile court did not abuse its discretion in determining that Father's sentence was of such length to deprive the children of a normal home for a period of years.

II.

¶26 Once the juvenile court finds by clear and convincing evidence that a statutory ground for termination exists, the court must then determine by a preponderance of the evidence whether severance is in the child's best interests. *Alma S.*, 245 Ariz. at 149-50 ¶ 8. Here, Father contends that there was "insufficient evidence" to support the court's best-interests finding. We disagree.

¶27 In a best-interests inquiry, "we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Id.* at 150 ¶ 12 (quoting *Kent K.*, 210 Ariz. at 286 ¶ 35). Accordingly, after the court finds "that a parent is unfit, the focus shifts to the interests of the child as distinct from those of the parent," and the "child's interest in stability and security" becomes the court's foremost concern. *Id.* (first quoting *Kent K.*, 210 Ariz. at 285 ¶ 31; and then quoting *Demetrius L.*, 239 Ariz. at 4 ¶ 15). Termination of a parent's rights "is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* at ¶ 13. Among the factors that the court may consider when making this determination are whether: "1) an adoptive placement is immediately available; 2) the existing placement is meeting the needs of the child[ren]; and 3) the children are adoptable." *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379 ¶ 30 (App. 2010) (internal citations omitted).

¶28 Here, the juvenile court found that the children were placed with a family that is willing to adopt. Additionally, the court determined that the children would benefit from termination because their adoption

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would allow them to remain together in "a stable, loving environment, and would be able to achieve permanency." The court went on to conclude that maintaining the parent-child relationship would be harmful to the children because the length of Father's imprisonment would impede the possibility of maintaining a normal parent-child relationship.

¶29 Viewing the record in the light most favorable to upholding the court's best-interests finding, *Demetrius L.*, 239 Ariz. at 2 ¶ 2, and applying our deferential standard of review, *id.* at 3 ¶ 9, we conclude that reasonable evidence supports the juvenile court's best-interests finding.

CONCLUSION

¶30 Because reasonable evidence supports the juvenile court's findings, we affirm the court's order terminating Father's parental rights.

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JUSTICE BOLICK, concurring in part and in the judgment

BOLICK, J., concurring in part and in the judgment:

¶31 I cannot join the opinion in full as I disagree that Arizona's termination of parental rights statute, as applied by this Court's rules and opinions, satisfies due process requirements. *Supra* ¶ 8. To the contrary, it falls far short, often depriving parents of their fundamental rights. *See, e.g.*, *Trisha A. v. Dep't of Child Safety*, 247 Ariz. 84, 92–95 ¶¶ 33–48, 100 ¶ 73 (2019) (Bolick, J., dissenting) ("[T]he process our state has constructed creates the very real prospect that parents will lose their children not because they deserve to, but because they are unable to effectively defend their rights in a system that is stacked hopelessly against them."); *Alma S.*, 245 Ariz. at 154–55 ¶¶ 30–36 (Bolick, J., concurring in the result); *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, 450 ¶ 48 (2018) (Timmer, J., dissenting in part and concurring in part); *Marianne N. v. Dep't of Child Safety*, 243 Ariz. 53, 59 ¶ 33 (2017) (Eckerstrom, J., dissenting).

¶32 The outcome in this case is harsh but not unwarranted. The father strove mightily to preserve a relationship with his children, even apparently sleeping in his car outside a homeless shelter after the family home burned down in order to remain close to his children. Even while incarcerated, he tried to maintain communication with his children, although it appears that DCS failed to fulfill its constitutional obligation to facilitate such contact. But when a parent commits a felony and is sentenced to lengthy incarceration, and the other parent is not present, the risk of forfeiting parental rights is necessarily great.

¶33 In this decision, the Court has begun to reattach the standards for termination of parental rights to their essential due process moorings, in two significant and commendable ways. First, it tightens the factors that should be considered in terminating a child's relationship with an incarcerated parent, so that they are no longer "self-fulfilling" such that "incarcerated parents could never adequately maintain a parent-child relationship with their young children," an implication the Court correctly concludes is "contrary to law." *Supra* ¶ 17.

¶34 Second, the Court makes clear that DCS must facilitate, and certainly may not affirmatively thwart, a parent's efforts to maintain a

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JUSTICE BOLICK, concurring in part and in the judgment

relationship with his or her children while in custody. *Supra* ¶¶ 18-21; see *Santosky*, 455 U.S. at 747-78; *Michael J.*, 196 Ariz. at 253 ¶ 38 (Zlaket, C.J., concurring in part and dissenting in part) (criticizing the predecessor agency to DCS for its failure to facilitate reunification). I trust that in future cases, lower courts will require DCS to facilitate maintaining the parental relationship as it is constitutionally required to do, and that this Court will overturn termination orders where DCS fails to do so.

¶35 For the foregoing reasons, I concur with the substance and outcome of the Court's opinion.

SUPREME COURT OF ARIZONA

JESSIE D.,) Arizona Supreme Court
) No. CV-19-0321-PR
Appellant,)
) Court of Appeals
v.) Division One
) No. 1 CA-JV 19-0073
DEPARTMENT OF CHILD SAFETY, F.V.,)
M.D., M.D., C.D.,) Maricopa County
) Superior Court
Appellees.) No. JD34609
)
)

MANDATE TO THE SUPERIOR COURT

TO:—Maricopa County Superior Court, Arizona,
in relation to Cause No. JD34609

The above entitled and numbered case was presented in your court and was brought before the Court of Appeals, Division One, No. 1 CA-JV 19-0073, in the manner prescribed by law. That court filed its opinion on November 14, 2019. A petition for review was granted by this Court on May 27, 2020.

This Court, having considered the case, filed its opinion on October 8, 2021, affirming the court's order terminating Father's parental rights.

The time for filing a motion for reconsideration has expired and no motion was filed.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held in said case as shall be required to comply with this Court's opinion (copy attached to this mandate).

IN WITNESS WHEREOF, I set my hand and affix the seal of the Supreme Court of the State of Arizona this 9th day of November, 2021.



/s/
Tracie K. Lindeman
Clerk of the Court

TO:

Hon. Jeff Fine
Thomas A Vierling
Mark Brnovich
Drew Curtis Ensign
Dawn Rachelle Williams
Toni M Valadez
Jessie D., ADOC 162851, Arizona State Prison, Florence - Eyman Complex - Administrative Offices
Madeline Vera
Hon. Joseph C Welty
Hon. Pamela S Gates
Hon. Joseph C Kreamer
Raymond L Billotte
Amy M Wood
pm

Appendix B

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

JESSIE D., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, F.V., M.D., M.D., C.D., *Appellees*.

No. 1 CA-JV 19-0073
FILED 11-14-2019

Appeal from the Superior Court in Maricopa County
No. JD34609
The Honorable Joseph C. Kreamer, Judge

AFFIRMED

COUNSEL

Vierling Law Offices, Phoenix
By Thomas A. Vierling
Counsel for Appellant

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

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Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Jennifer M. Perkins joined.

M c M U R D I E, Judge:

¶1 Jessie D. ("Father") appeals the termination of his parental rights to his children, Free, born in 2010, Melony, born in 2012, Madeline, born in 2013, and Creed, born in 2015 (collectively, the "children"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In August 2017, the Department of Child Safety ("DCS") removed the children from the care of Joana V. ("Mother").¹ DCS removed the children from Mother's care because of homelessness, a history of domestic violence with her significant other, and substance-abuse issues. At the time of removal, Father was incarcerated. In July 2017, Father was convicted of two counts of Aggravated Driving or Actual Physical Control While Under the Influence of Intoxicating Liquor or Drugs, a class 4 felony. Father was sentenced to seven years in prison with a maximum release date of December 2022.

¶3 In June 2018, DCS moved to terminate Father's parental rights to the children under the length-of-felony sentence ground, Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(4). The juvenile court held a termination hearing in November 2018, during which the case manager and Father testified. Following the hearing, the juvenile court found that Father's sentence was of sufficient length to deprive the children of a normal home life for years. The court further found that DCS had shown by a preponderance of the evidence that termination of Father's parental rights would be in the children's best interests. Accordingly, the court issued an order granting DCS's termination motion regarding Father. Father appealed, and we have

¹ Mother's parental rights to the children were terminated, but she is not a party to this appeal.

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jurisdiction under A.R.S. § 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶4 To support the termination of parental rights, DCS must prove at least one statutory ground for termination by clear and convincing evidence. A.R.S. § 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). The juvenile court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *ADES v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). We review the court’s termination decision for an abuse of discretion and will affirm unless no reasonable evidence supports the court’s findings. *Mary Lou C. v. ADES*, 207 Ariz. 43, 47, ¶ 8 (App. 2004).

A. The Juvenile Court Did Not Abuse Its Discretion by Terminating Father’s Parental Rights to the Children Under the Length-of-Felony Sentence Ground.

¶5 Father argues the juvenile court erred by terminating his parental rights to the children under the length-of-felony sentence ground. To terminate Father’s rights under this ground, DCS was required to establish by clear and convincing evidence that Father “is deprived of civil liberties due to the conviction of a felony” and Father’s sentence “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. v. ADES*, 196 Ariz. 246, 251, ¶ 28 (2000).

¶6 Because Father does not dispute that he has been deprived of his civil liberties due to a felony conviction, we only address whether reasonable evidence supports the juvenile court’s finding that Father’s sentence is of such a length that the children will be deprived of a normal home life for a period of years. This is a fact-specific inquiry based on consideration of all relevant evidence. *Michael J.*, 196 Ariz. at 251, ¶ 29. Relevant factors to consider include but are 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

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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. Here, the juvenile court addressed each consideration.

¶7 Regarding the parent-child relationship before incarceration, the court found that the relationship "was not particularly strong." The court found that Father was not living with the children before his imprisonment because he was sleeping in a car outside the shelter where the children were staying. The DCS case manager also testified that the children rarely talked about Father after coming into DCS's care. Additionally, based on Father's testimony about his activities with the children, the court determined that he was not a primary caretaker of the children.

¶8 Concerning the possibility of maintaining a parent-child relationship during incarceration, the court did not agree with Father's testimony that he could keep a healthy relationship and parent from prison. The court emphasized the children's young ages and the lack of meaningful contact Father can have with them while incarcerated.

¶9 Regarding the age of the children and the likelihood Father's incarceration will deprive the children of a normal home life, the court found the children's "collective young age . . . makes it virtually impossible to maintain anything approaching a normal parent-child relationship." At the time of Father's incarceration, the children's ages ranged from one-and-a-half to seven years old.

¶10 The court correctly considered the total length of the sentence, the maximum release date of December 2022, and a potential earlier release date of September 2022. Furthermore, the court noted that the "time needed for services to be completed after release" may extend the time for reunification. The court found a realistic reunification date would be "mid to late 2023 at the earliest."

¶11 The court found that another parent is not available because Mother's rights had been terminated.

¶12 Finally, the court considered the effect that the deprivation of a parental presence would have on the children and found that the children would "essentially be left adrift if Father's rights are not severed." The court determined that a healthy relationship would be highly unlikely and

B. The Juvenile Court Did Not Abuse Its Discretion by Concluding Termination of Father's Parental Rights Was in the Children's Best Interests.

¶17 Once the court finds a parent unfit under at least one statutory ground for termination, "the interests of the parent and child diverge," and the court proceeds to balance the unfit parent's "interest in the care and custody of his or her child . . . against the independent and often adverse interests of the child in a safe and stable home life." *Kent K.*, 210 Ariz. at 286, ¶ 35. "[A] determination of the child's best interest must include a finding as to how the child 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 (1990). Courts "must consider the totality of the circumstances existing at the time of the severance determination, including the child's adoptability and the parent's rehabilitation." *Alma S. v. DCS*, 245 Ariz. 146, 146, ¶ 1 (2018). "When a current placement meets the child's needs and the child's prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child's best interests." *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4, ¶ 12 (2016). Finally, "[t]he existence and effect of a bonded relationship between a biological parent and a child, although a factor to consider, is not dispositive in addressing best interests." *Dominique M. v. DCS*, 240 Ariz. 96, 98, ¶ 12 (App. 2016).

¶18 Here, the juvenile court found that the children's needs were being met in their current placement and that adoption of the children by a single adoptive placement was likely and possible. The children are currently placed together in a licensed foster home. The DCS case manager testified that this placement is meeting all their needs and is willing to adopt all four children.

¶19 Father does not challenge the court's findings concerning the children's adoptability. Instead, Father argues that the best-interests finding was incorrect for the same reasons the court's analysis of the statutory ground for termination was incorrect. Father contends that he has a relationship with the children and that, by "not permitting visitation or contact," DCS skewed the best-interests finding. As previously stated, Father waived any objection concerning DCS's conduct regarding visitation by failing to raise it until after the termination hearing. *Shawanee S.*, 234 Ariz. at 179, ¶¶ 17-18. Regardless, this does not change the finding that the children would benefit from adoption because Father could not provide a normal home for years. The children were immediately adoptable and would benefit from the stability adoption would provide. Reasonable

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evidence supports the court's finding that severance was in the best interests of the children because adoption is likely and possible. *Demetrius L.*, 239 Ariz. at 4, ¶ 16 ("It is well established in state-initiated cases that [a] child's prospective adoption is a benefit that can support a best-interests finding."). Thus, we conclude the juvenile court did not err by finding the termination of Father's parental rights was in the children's best interests.

CONCLUSION

¶20 For the foregoing reasons, we affirm the juvenile court's order terminating Father's parental rights to the children.



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

Appendix C

[43 °F 60 °]

Jesse Wilder Darrin, 162851
ASPC-EYMAN/UNIT COOK
P.O. BOX NO. 3200
FLORENCE, AZ 85132

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

7 "Jessie D.,

8 Appellant,

Case No. JD 34609

10 v.

11 Department of Child Safety,
12 and A.G.C., S.D.E., et al.,
13 Appellees."

Notice of APPEAL

and request for Appointment of
an "effective assistance of Counsel"

(Previous counsel failed to inform me of my
Right to Appeal.)

17 Pursuant to Rule 103 (A) (B) (D) and (C) of the Arizona Rules of
18 Procedure for the Juvenile Court, Notice is hereby given, and that Court
19 Appointed Counsel Steve Ekhardt/Ride Out Law PLLC, Proceeding with his
20 Client, the biological father (pro se herein) Jessie Wilder Darrin, in the
21 matter of Free V., Melony D., Madeline D., Creed D., when the final Order,
22 that is the Subject of this appeal, was filed, But that Counsel had Failed
23 to Communicate thereafter "entry of Judgment," to discuss the merits
24 of the appeal, nor to obtain Authorization to file this Notice of
25 Appeal. 1 Therefore, Counsel proves deficient in his Performance by
26 acts and omissions, to include his representation; filing of reasonable
27 pleadings 2, while in possession of Material ISSUE of fact 3, Pertinence
28 to divestiture of Subject matter 4, his Suppression by act of Conceal-
29 ment to Keep Unpublished (Tangible Evidence) 5 That negates Jurisdiction
30 over termination of Parent - Child Relationship Purposed for Adoption. 6

31 1. Quotation (2/8/2019) [STEVE EKHARDT]: "Mr. Darrin, Hey, I am no longer representing you, the Judge wanted me to
32 let you know that you are no longer apart of these proceedings and that your rights have been terminated; yes,
I will look for your Parents and call them." Meaninglessly, this Concluded our Comprehensive Communication, to wit:
33 2. DUE TO BEING under the representation of RIDE OUT LAW, Inmate Legal Service Stated they're unable
to file motion(s), for processing by the Clerk of Court in October; motions were forwarded to attorney
Certified delivery by MCSO (I.L.S.), including Cover letter, Contents and Instructions (Legal Visit

basis) discussions, RE: (PCR); Conviction: (A) not Final; (B) BAD fruits.; 8/4/2017 VOID ORDER (procedural defect); Preliminary hearing Protective ORDER and Proceedings thereafter, ORDER by Judge Glenn Allen. (3 T.L.S.) certified the delivery of (PCR) Petition Containing EXCULPATORY EVIDENCE material ISSUE of fact divest court jurisdictional want; Caveat drawing Conscience of the Court and ALL PARTIES, TO include the Departments RISK MANAGEMENT. Pertinence of **FRUITS OF THE POISONOUS TREE DOCTRINE**. See 46, AM. Jur. 2D Judgements § 31 (1994) ("The General Principle that a Void Judgment is a nullity, is not entitled to enforcement and that "[a]ll proceedings founded on the Void Judgment are themselves regarded as invalid and ineffective for any purpose."); see **VOID ORDER 08-04-2017**.

NOTICE IS GIVEN HEREBY THAT, I, Jessie Wilder Darrin IS of Neglegent income Likewise herein AM Requesting Counsel aswell as, do hereby Appeals from the final Order of this Court Signed by the honorable Judge Joseph Kreamer filed February 8, 2019, terminating the parent-child relationships between Jessie D., and Free V., Melony D., Madeline D., and Creed D., Pursuant to Enactment of A Statute that Directly and Substantially Impairs Constitutionally (PROTECTED) Rights and Deprives the Parent-child Relationship (RIGHTS)⁸ therewith, Ariz. Rev. Stat. § 8-533 (B) "allegedly Supported by *The Michael J. Factors*," to wit: EVOKEs the 6TH Amendment right to Confrontation Clause and right to Effective Assistance of Counsel, to Support Pleading by Discovery Material and Full-Disclosure and to Raise Colorable Claims or to Present material ISSUE of Fact Precluded or Simply not Considered Disputing the Factors Setforth in "*The Michael J. Case*" Disproves the Element¹⁰ *That Integral Part Necessary For Completeness*, in Order to enact statutory Provisions Contained within Title 8, Chapter 5¹¹.

In addition, I was deprived of opportunity to maintain bonds with my children while in foster Care¹², and my Parents were Viable Custodians of the children with Grandparent Natural Rights¹³.

Notably, thier Applications were not processed and Courts initial Orders¹⁴ with Visitation were blatantly Violated by Custodial Parents **UNTIL**¹⁵ children began to adjust to having no parents and the one bit of Contact I did have the foster Parents turned it against me and claimed when they cried, reached out, wanted, and asked where I was; They Said that Justified Cutting off all Contact with me, also the Paternal Grandparents and Uncle which Court did order against my opposition: see Father's Motion, Submitted August 3rd, 2018 ("re-numbered"), as an act of Concealment to Suppress Defendants Legal Argument; (Cause No. JD 31609, Motion for Declaratory Judgment, Motion for Mandatory Injunction, Motion for Change of Counsel, supported by Affidavits) — [Page [3] of 22.]

⁵ Prima Facie Evidence "Refuting states Supposition" in both Criminal & Juvenile Trial Court.
⁶ See in the matter of the adoption of Hadraht, 121 Ariz. 606, 609, 592 P.2d 1262, 1265 (1979). A Judgment or order is VOID if the court entering it lacked jurisdiction: 1 over Subject matter, 2 over the Person Involved, or 3 to render the Particular Judgment or ORDER ENTERED.

7. See Martin v. Martin, 182 Ariz. 11, 15, 893 P.2d 11, 15 (APP. 1994) (A VOIDABLE JUDGMENT IS ONE
in which the court has jurisdiction over the subject matter and parties but which is otherwise
erroneous and subject to reversal.) See also Ariz. Rev. Stat. § 8-231 (B).
8. Parent-Child Relationships lies at the heart of Constitutionally Protected familial
Associations, Kipps v. Caillier, 205 F.3d 203 (5th Cir. 2000).
9. (A parent has a fundamental liberty interest in the companionship and society of her child, and
the states interference with that liberty interest without due process of law is
remediable under § 1983.) Lee v. County of Los Angeles, 240 F.3d 754 (9th Cir. 2001).
10. Legal innocence is a fair and just reason to withdraw a guilty plea. U.S. v. Salgado-
Ocampo, 159 F.3d 322 (7th Cir. 1998).
11. A CRIMINAL CONVICTION BECOMES FINAL WHEN THE SUPREME COURT DENIES CERTIORARI.
Sepulveda v. U.S. 330 F.3d 55 (1st Cir. 2003); See Amanda Lauers Motion "attachment" D.
12. See P.O.P.S. v. GARDENER, 998 F.2d 764 (9th Cir. 1993) (rights to marry, have children, and
maintain relationships with children are fundamental rights protected by the Fourteenth
Amendment and thus, strict scrutiny is required of any statutes that directly and
substantially impair those rights.); See M.E. 9/6/2017, pg. 5, 6. Court directs DCS to follow up w/visits.

Notably, the court also never ruled upon the grandparents request for custody of children because ('in his abuse of discretion'), they could not afford to be represented by counsel. And so... the court gave custody to the upper class... sociable, acceptable, ethnicity whom are not the children's family of significant relation; Court refused to process the application of children natural grand parents, violating procedural DUE-
PROCESS:

1. Due process requires as general matter opportunity to be heard at a meaningful time and in a meaningful manner.
2. Citizens must be afforded due process 'before' deprivation of life, liberty, or property. Nat. Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001);
Mathews v. Eldridge, 424 U.S. 319, 333, 47 Led 2d 18, 96 S.Ct. 892 (1976); Armstrong v. Monza, 380 U.S. 545, 552, 14 Led 2d. 62, 85 S.Ct. 1187 (1965). See Childrens Grandparents' Filed Petition for Application for Permanent Guardianship, in the matter JD 34609, RE: the children, Hon. Joseph Kramer; See also Rule 47.1. Mandatory Judicial Determination: (B) and (C)(1); and Rule 63. Guardianship Adjudication Hearing: (A) and (D); Procedure in its entirety; (Rule 37. Definitions: A. Parties... "or Petitioner", Pursuant Rule 24, Ariz. R. Civ. P.; (C), (6)). See Rule 50. B. 11.

Finally, I appeal from the Hon. Glenn Allen, Superior Court Judges' ORDER, Dated 8/4/17, initiating these proceedings based upon the grounds of Lack of subject matter jurisdiction and over the persons involved (A VOID JUDGMENT IS NO JUDGMENT AT ALL AND ANY SUBSEQUENT PROCEEDINGS BASED ON THE VOID)

JUDGMENT ARE THEMSELVES VOID. Valley Vista Dev. Corp v. City of Broken Arrow, 766 P.2d 344 (Okla. 1982), and the "misrepresentation" of Amanda Lauers

13. See Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89 (2nd Cir. 1999) ("Parents' interest in the custody of a child is a constitutionally protected liberty interest subject to due process protection."); See M.E. 8/8/2017, pg. 3: "Mr. Darrin is not in agreement

with the current placements and would like for His Mother and/or brother to be considered "as placement of the children." 14 See TR. (M.E. 8/8/2017), COURT ORDER VISITATION Pg. 5. See also RULE 50(C)(4). Make findings and enter orders regarding services for the child and family, including visitation as required by law. See also (M.E. 6/18/2018), Pg. 2. Mr. Laufer Request an update from the department regarding the paternal grandparents being Considered as placement for the Children. Mother objects to case plan goal and pg. 3, THE COURT 15 DIRECTS THAT THE DEPARTMENT FOLLOW UP ON MS. LAUER'S REQUEST.

15 See (M.E. 6/18/2018), Pg. 3. "The paternal Grandparents would like to be able to take the children to visit thier father in the Arizona Department of Corrections. Mrs. Laufer Request that the ISSUE be LEFT at the children's discretion." ; "THE COURT DIRECTS DEPARTMENT TO CONDUCT A FOLLOW UP."

Legal visits' NATURE and Cause of Action (Affidavit of Jessie Wilder Darrin - Actual Conflicts of Interest, at pg.1. "attachment of Fathers Motion Submitted with Counsels uncontested motion); and Intrusion by "UNKNOWN Party" within Legal Visit - to the extent both Counsel and "unidentified person" PROBED for inculpating answers to unrelated Questions Pertaining to Domestic Violence, see pg.1. of affidavit / conflicts.

Lastly, I Appeal from Both Judges' Interest in "Severence HEARINGS" by, and through, the Lack of Fair Consideration; and Ex PARTE ORDERS while I had been made PARTICULARLY UNAVAILABLE, as evidenced by the record to be a Concerted Action to Defraud and Obtain by Deprivation of Such

UNALIENABLE RIGHT, DOCTRINATED UNCONSTITUTIONAL VIOLATIONS. 17

It is respectfully Requested, due to Councils Glaring failure to inform me, Prior to, as well as After his legal Representation, that I be appointed Effective assistance of Counsel to ensure my rights NO longer violated and the Preparation of ALL Transcripts so that I may assist in this Right-to-Appeal, and Order the Production of Document ("Father's Letter/Request of Public Relief" written to: P.O.BOX-6030 S/C CH 010-23A, PHX, 85005), initiating involvement — 5/19/2017. 18 Pursuant to Rule 105, 104, and 103. ^{see EXHIBIT 1 attached here to}

Respectfully Submitted this 5 th day of February, 2019.

13/Jessie Wilder Darrin

Jessie Wilder Darrin The Father.

16 See Meachum v. Fano, 427 U.S. 215, 49 Led 451, 96 S.Ct. 2532 (1976) (A REVIEWING Court has the right to determine whether an inmate was DEPRIVED of a State Created or Liberty Interest Granted by Rule or STATUTE or REGULATION PROMULGATED BY The Government.)

17 Notably, the Judges HELD INTEREST in the Severence to Promote Adoption, also me and my Parents were Discriminated Against, with Bias, as well as the Uncle. . . AND NOTABLY THERE IS NOTING IN THE RECORD TO THE CONTRARY.

18 Parents have a LIBERTY Interest in the Care, Custody, And Management of thier Children.) Swipes v. Kofka, 348 F3d 701 (8th Cir. 2003)

18 State and DCS has precluded me from any Discovery Material that might aid in Pleadings or Mitigation to support Deviation Request. . . as Shown in this Denial to DCS Report.

1 I Hereby Certify that I handed the original of the foregoing to the
2 Librarian on this 5th day of February, 2019, for Copies, to be delivered
3 Via U.S.P.S. and Filed to the Clerk of the Superior Court:

4
5 - 201 West Jefferson street Phoenix Arizona 85003 (original)
6

7 I Hereby Certify that I am not an Attorney, Nor do I have any Legal
8 Advocate assisting me in the Execution of this Notice as a matter
9 Record - to - be Ineffective assistance of Counsel, and that due to being
10 under 'Quarantine' I have not Further Resource, but that I am
11 enclosing (2) copies for the purpose of (IF) there are additional
12 Parties unbeknownst to me, at this time, that they may be
13 provided for (2-COPIES), thank you in advance for your prompt response.

14
15 March
16 Respectfully Submitted this 5th day of February, 2019.
17 By: Jessie Wilder Darrin
18 (Jessie Wilder Darrin / The childrens father
19

20 I hereby swear under the penalty of Perjury that the foregoing is both True and Accurate
21 Known to be as so upon AFFirmation and Understanding between All Parties and
22 Participants involved in Jd 34609 Case no., and attest to the Following:

23 1. I submitted notice to be copied due to Quarantine and that on the 7th, this month
24 the Paralegal, Undersigned, "Wilson" had Denied my Paralegal Request for Copies, due - to being
25 Indigent, on 3/8/19, for the reasons as stated on denial: (Notice of Appeal is NON-Qualified-
26 REGARD- TERMINATION OF PARENT ^{AL} Right), which is a denial of 1st Amendment Constitutional
27 Right to petition the government for Redress Agrievances, i.e., Refusal to my Access to Courts, as such
28 Further Frustrates the Fairness of these Proceedings. (see EXHIBIT 2 attach herewith)

29 2. for the reasons set forth herein, Notice is now being Copied, awaiting outgoing U.S.P.S.
30 EXECUTED this 12th day of February, 2019, under § 28 U.S.C. 1746

31
32 15/Jessie Wilder Darrin

33 Jessie Wilder Darrin The Childrens Father.