

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24



DIVISION ONE  
FILED: 07/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

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

CHARLES M. , ) 1 CA-JV 11-0233  
)  
Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz.R.P.Juv.Ct.  
SECURITY, NICHOLAS M., SAMARAH M., ) 103(G); ARCAP 28)  
)  
Appellees. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. JS506893

The Honorable David K. Udall, Judge

**AFFIRMED**

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Thomas A. Vierling  
Attorney for Appellant

Phoenix

Thomas C. Horne, Attorney General  
By Eric Devany, Assistant Attorney General  
Attorneys for Appellees

Mesa

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**H O W E**, Judge

¶1 Charles M. ("Father") appeals the juvenile court's order severing his parental rights to his son, Nicholas M., and daughter, Samarah M. (collectively, "the children"). Because

reasonable evidence supports the juvenile court's decision, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Father has a history of criminal offenses. In April 2008, while on probation for forgery, Father was arrested for robbing a pharmacy at gunpoint. He pled guilty to aggravated assault and was sentenced to a five-year prison term beginning October 2008. Father's sentence expires in July 2013. In May 2009, the Arizona Department of Economic Security ("ADES") took his then nine-year old son and nine-month old daughter into custody because their mother informed ADES that she would be homeless and could no longer control her son, who had developed violent behavioral problems. The children were found dependent as to both parents in September 2009. The next month, the children were placed in a foster home.

¶3 About two years later, the children's guardian ad litem filed a petition to terminate both parents' rights to the children. The petition alleged pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (West 2012),<sup>1</sup> that the length of Father's incarceration would deprive the children of a normal home for a period of years. Father denied the allegations, and a contested evidentiary hearing was held in

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<sup>1</sup> Absent revisions material to this decision, we cite to the current Westlaw version of applicable statutes.

August 2011. After taking the matter under advisement, the juvenile court severed Father's parental rights to the children pursuant to A.R.S. § 8-533(B)(4).

¶4 Father timely appealed.<sup>2</sup> We have jurisdiction pursuant to A.R.S. §§ 8-235, 12-120.21 and -2101(B).

#### DISCUSSION

¶5 Father contends insufficient evidence supported termination of his parental rights based on the length of his incarceration, as set forth by the factors enumerated in *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 995 P.2d 682 (2000). We disagree.

¶6 A parent-child relationship may be terminated based on clear and convincing evidence that "the parent is deprived of civil liberties due to the conviction of a felony" and that the 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). Because there is no bright-line rule for when the length of a sentence warrants termination of parental rights, the juvenile

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<sup>2</sup> Mother's parental rights to the children were terminated based on the children's out-of-home placement for fifteen or more months pursuant to A.R.S. § 8-533(B)(8)(c). Although initially consolidated for appeal, Mother's case was later dismissed upon her counsel's notice that he found no meritorious issue on appeal pursuant to Rule 106(G)(1), Juvenile Court Rules of Procedure. Consequently, Mother is not a party to this case.

court must consider the facts of each case. *Michael J.*, 196 Ariz. at 251, ¶ 29, 995 P.2d at 687.

¶7 In *Michael J.*, the Arizona Supreme Court set forth a non-exhaustive list of relevant factors a court should consider in making that determination, 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 the 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, ¶ 29, 995 P.2d at 687-88. On review, this Court views the facts in the light most favorable to sustaining the juvenile court's decision. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). We accept the juvenile court's factual findings unless no reasonable evidence supports them, and we will affirm unless the severance order is clearly erroneous. *Id.* at 280, ¶ 4, 53 P.3d at 205.

¶8 Reasonable evidence supports the juvenile court's ruling that Father's prison sentence would deprive the children of a "normal home" for a period of years under A.R.S. § 8-

533(B)(4). See *Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986) (defining "normal home" as a home in which the parent has a presence). When Father went to prison, the son had just turned nine years old and the daughter was nine months old. Given the children's young age, the case manager opined there was a "very good likelihood" that Father's incarceration will deprive the children of a "normal home." Although Father argues that he had a normal relationship with the son before incarceration, Father's prison sentence covers more than a third of the son's life and the majority of the daughter's life.

¶19 In addition, the case manager stated that when a child has a relationship with a parent who is regularly absent, the child is normally "very sad" and will often ask about the parent. She explained that the daughter never asked about Father, and the son did not ask about him in over six months, indicating their relationship with Father was not strong.

¶10 The case manager's testimony further shows that Father made little or no effort to nurture any relationship that he may have had with the children. The case manager testified that Father wrote her only once asking how the son was doing, and he never inquired about the daughter. Father made no effort to write to the children or send them any gifts or cards.

¶11 Father also did not request visitation. Although he blames ADES for failing to provide visitation and other services, ADES has no duty to provide reunification services when termination is based on length of sentence. *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶¶ 6-7, 106 P.3d 327, 328 (App. 2005). Moreover, the case manager testified that visitation was not offered because psychological evaluations determined that it would be harmful to the children due to the daughter's young age and the son's need for stability. Father argues that the court must conduct a hearing before finding that visitation would be harmful to the children. Father has waived that argument because he did not request a hearing or raise visitation as an issue at trial. See *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 437, 581 P.2d 271, 282 (App. 1978) (declining to consider issue first raised on appeal).

¶12 Father also argues that the length of his sentence does not support termination because his release should be "only a few months away." "Under A.R.S. section 8-533(B)(4), the court must consider the entire length of the sentence and not whether the parent may be parole eligible within that time." *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 354 n.3, ¶ 12, 972 P.2d 684, 687 n.3 (App. 1998). Because the relevant length of time is the entire period of his incarceration and absence from

the home, we find no abuse of discretion. See *Jesus M.*, 203 Ariz. at 281, ¶ 8, 53 P.3d at 206.

¶13 Regarding the remaining two *Michael J.* factors, the availability of another parent and the effect of parental absence on the children, Father does not dispute that the mother would be unavailable to provide a "normal home" or that the children have been adversely affected by the complete deprivation of parental care. 196 Ariz. at 251-52, ¶ 29, 995 P.2d at 687-88. The record shows that parental neglect caused the son to develop behavioral problems, including attention-deficit hyperactivity, post-traumatic stress, and other anxiety disorders. The daughter suffered developmental delays in speech that also required special care. Because Father was incarcerated and therefore unable to meet the children's immediate needs, the juvenile court did not err in finding that the length of Father's sentence would deprive the children of a normal home.

¶14 Finally, Father challenges the juvenile court's finding that ADES proved by a preponderance of the evidence that termination of his parental rights was in the children's best interests. See A.R.S. § 8-533(B). Father asserts that he has changed his ways and deserves a chance to prove it as a parent. He therefore contends that the trial court erroneously focused on the adoptability of the children instead of his ability to parent them after his release.

¶15 Father improperly focuses the best interests inquiry on himself. See *Kent K. v. Bobby M.*, 210 Ariz. 279, 287, ¶ 37, 110 P.3d 1013, 1021 (2005) (stating the best interests "inquiry focuses primarily upon the interests of the child, as distinct from those of the parent."). To prove that termination is in the children's interests, ADES "must present credible evidence" showing *the children* "would benefit from a severance or be harmed by the continuation of the relationship." *Lawrence R. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 585, 587, ¶ 8, 177 P.3d 327, 329 (App. 2008) (emphasis omitted).

¶16 Here, ADES presented credible evidence that the children would benefit from adoption by their foster parents. The case manager observed the children in the foster home and testified that the foster parents "know the children's needs. They are consistent with them. Their follow up is phenomenal ... [and] both children feel safe where they are. They wake up every morning knowing the routine. Their stability has just improved and they have made progress because of that stability." Because the children were "thriving" in the foster home and had bonded with the foster parents, she opined that adoption would be in the children's best interests. Psychological evaluations showed the daughter had bonded with the foster mother, that both children's conditions improved, and that they needed the continued stability the foster parents were able to provide.



Under these circumstances, the trial court did not abuse its discretion in finding that adoption would be in the children's best interests.

**CONCLUSION**

¶17 For these reasons, we affirm.

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge