

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

PETER S.,) 1 CA-JV 11-0118
)
Appellant,) DEPARTMENT B
)
v.)
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY; ANGELO S., ALONZO S.,) (Not for Publication -
) 103(G) Ariz. R. P. Juv.
) Ct.; Rule 28 ARCAP)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD18785

The Honorable A. Craig Blakey, II, Judge

AFFIRMED

John L. Popilek, P.C.
By John L. Popilek
Attorneys for Appellant

Scottsdale

Thomas C. Horne, Arizona Attorney General
By David M. Osterfeld, Assistant Attorney General
Attorneys for Appellees

Phoenix

K E S S L E R, Judge

¶1 Peter S. ("Father") appeals the superior court's order terminating his relationship with his two minor children, Angelo

and Alonzo, pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (Supp. 2011).¹ For the following reasons we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father has been incarcerated since February 2010, with an expected release date of February 2016. He is serving a six-year prison term in the Arizona Department of Corrections after pleading guilty to charges of aggravated assault, threatening or intimidating, and aggravated DUI. The aggravated DUI charge resulted from an automobile accident in which Mother was killed, and Father and children were hospitalized. Afterward, Father was involved in an altercation with police officers, resulting in the other two charges.

¶3 The Arizona Department of Economic Security ("ADES") filed a motion to sever Father's parental rights as to Angelo and Alonzo, alleging that Father had failed to protect the children from neglect or willful abuse under A.R.S. § 8-533(B)(2), and that his incarceration would deprive the children of a normal home for a period of years under A.R.S. § 8-533(B)(4).

¶4 During the severance hearing, Father admitted to being a registered sex offender, to his prior criminal history, and to

¹ We cite to the current versions of any statutes unless the statutes have been materially amended after the proceedings below.

having a history of substance abuse. Since his current incarceration, Father has failed to send the children letters or to otherwise initiate contact with them.

¶5 Child Protective Services caseworker Douglas DeCiancio testified at the hearing that the length of Father's sentence will deprive the children of a normal home life. Specifically, DeCiancio reported that the children were bonding with their maternal relatives, that they considered these relatives to be their mother and father, and that Father is unable to nurture a parent-child relationship because of his incarceration.

¶6 Psychologist Daniel Juliano conducted an evaluation of Father. At the hearing, Dr. Juliano opined that Father is at a high risk of recidivism, and that he suffers from personality disorders, which will make it difficult to provide the children with a normal home life.

¶7 After the hearing, the superior court severed Father's parental rights pursuant to section 8-533(B)(4), finding by clear and convincing evidence that Father's incarceration is of such a length that the children will be deprived of a normal home for a period of years. Among the court's findings were: (1) Angelo and Alonzo were, respectively, only sixteen months and three months old when Father was incarcerated; (2) prior to her death, Mother primarily raised the children; (3) Father had no visits with the children for over sixteen months after being

incarcerated; (4) Father had not initiated any contact with the children since their placement with maternal relatives; (5) because of the length of Father's sentence, he will miss at least one-third of Angelo's and Alonzo's childhood, including developmental milestones; (6) Mother is deceased, so there is no other parent available to provide a normal home life during Father's incarceration; and (7) the children are bonded to their maternal relatives. The court also considered Father's criminal history and Dr. Juliano's prognosis, which indicated that he would need at least one year of therapy after his release before reunification with the children could begin.

¶18 Father timely appealed and this Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2010).

STANDARD OF REVIEW

¶19 On appeal, "we will accept the [superior] court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). We do not reweigh the evidence, but "look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004).

DISCUSSION

¶10 Father contends that the superior court erred in finding that the length of his sentence would deprive his children of a normal home for a period of years. Pursuant to section 8-533(B)(4), the court may sever a parent-child relationship upon finding "[t]hat the parent is deprived of civil liberties due to the conviction of a felony . . . 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." The "court must also consider the best interests of the child." *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205.

¶11 There is no bright-line "definition of when a sentence is . . . long [enough] to deprive a child of a normal home for a period of years." *Michael J. v. Ariz. Dep't. of Econ. Sec.*, 196 Ariz. 246, 251, ¶ 29, 995 P.2d 682, 687 (2000). In making its decision, the superior court should consider all relevant factors, including (but 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.

Id. at 251-52, ¶ 29, 995 P.2d at 687-88. Severance is proper if, after considering these and other relevant factors, the court determines by clear and convincing evidence that the sentence is long enough to deprive the child of a normal home for a period of years. *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205.

¶12 The superior court did not err in severing Father's parental rights. The court considered all of the *Michael J.* factors in making its decision. Specifically, the court found and the record supports that: (1) there was not a strong relationship between Father and the children prior to incarceration; (2) the relationship was unlikely to continue during incarceration because of Father's failure thus far to remain in contact with the children, and because of the practical and emotional difficulties in bringing children to prison visits; (3) Angelo and Alonzo were sixteen months and three months old, respectively, at the time Father was incarcerated, and therefore Father was likely to miss many critical years due to the length of his sentence;² (4) because Mother is deceased, there is no other parent available to

² This finding combines the analysis of the third and fourth *Michael J.* factors.

provide the children with a normal home; and (5) the children are bonding in their placements with maternal relatives.

¶13 Father argues that it was improper for the superior court to consider his prior criminal history, apparently because criminal history is not explicitly enumerated as a *Michael J.* factor. However, the enumerated *Michael J.* factors are not exhaustive, and the court must consider all relevant factors when making its determination. *Michael J.*, 196 Ariz. at 251-52, ¶ 29, 995 P.2d at 687-88. The court did precisely that when it considered Father's criminal history, psychological condition, and bleak psychological prognosis.

¶14 Father also argues that severance is improper because, although he was sentenced to six years' imprisonment, he has fewer than five years left to serve. However, the superior court must consider the entire period of incarceration, not just the time remaining on the sentence at the time of the hearing. See *Jesus M.*, 203 Ariz. at 281, ¶ 8, 53 P.3d at 206 (interpreting "the words 'will be deprived' in § 8-533(B)(4) to mean 'will have been deprived' in total, intending to encompass the entire period of the parent's incarceration and absence from the home."). Furthermore, Father argues that severance is usually granted only when the sentence is much longer than the sentence here. However, in *Michael J.*, the court held that when balanced against other listed factors, even a sentence of three

years might be sufficient to sever the parental relationship.
Michael J., 196 Ariz. at 251, ¶ 29, 995 P.2d at 687.

¶15 Finally, Father's challenge to the weight that the superior court gave certain factors, including Mother's absence, does not provide grounds for reversal. It is not the role of this Court to reweigh the evidence on review. *Jesus M.*, 203 Ariz. at 282, ¶ 12, 53 P.3d at 207.

CONCLUSION

¶16 For the reasons stated above, we affirm the severance order.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

PETER B. SWANN, Judge