

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

JUSTIN M.,
Appellant,

v.

ARYN S., S.M., AND J.M.,
Appellees.

No. 2 CA-JV 2017-0070
Filed July 25, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Graham County
No. SV201600026
The Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

COUNSEL

E.M. Hale Law, Show Low
By Elizabeth M. Hale
Counsel for Appellant

Flores & Clark, PC, Globe
By Daisy Flores
Guardian Ad Litem for Minors

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly¹ concurred.

ECKERSTROM, Chief Judge:

¶1 In this private severance proceeding, Justin M. appeals from the juvenile court’s order terminating his parental rights to his sons S.M., born in February 2013, and J.M., born in June 2014, based on the length of the prison term he must serve as a result of felony convictions and on the nature of those felony convictions. *See* A.R.S. § 8-533(B)(4).² Finding no error or abuse of discretion, we affirm the court’s order.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the juvenile court’s ruling. *Manuel M. v. Ariz. Dep’t of Econ.*

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²Section 8-533(B)(4) provides:

Evidence sufficient to justify the termination of the parent-child relationship shall include . . . [t]hat 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 unfitness of that parent to have future custody and control of the child, . . . or 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.

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Sec., 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). Justin and his ex-wife Aryn S. are the biological parents of S.M. and J.M. In May 2015, Justin pleaded guilty to three counts of attempted sexual exploitation of a minor, class three felonies and dangerous crimes against children, and was sentenced to five years' imprisonment to be followed by drug abuse rehabilitation, sex offender probation, and lifelong sex offender registration requirements. The charges stemmed from ten images, found on his computer, of girls between five and ten years old engaged in "sexual[ly] exploitative conduct."

¶3 Aryn took the boys to visit Justin in prison twice, in August and September 2015, but not since then, having decided it was not a good environment for them. She filed for divorce in June 2016, and the divorce decree limited Justin's court-ordered parenting time to bi-weekly, fifteen-minute telephone calls.

¶4 In November 2016, Aryn filed a pro se petition to terminate Justin's parental rights, alleging that the length of his prison sentence would deprive the children of a normal home for a period of years and that the nature of the felonies committed proves his unfitness to have future custody and control of the children. At the termination hearing in March 2017, B.L., who had been living with Aryn since May 2016, testified he has a close bond with the boys, considers them to be his children, and would like to adopt them.

Discussion

¶5 A juvenile court may terminate a parent's rights if it finds both clear and convincing evidence of one of the statutory grounds for termination and a preponderance of evidence that termination of the parent's rights is in the children's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). If sufficient evidence supports any one of the statutory grounds, "we need not address claims pertaining to the other grounds." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. See *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz.

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92, ¶¶ 9-10, 210 P.3d 1263, 1265-66 (App. 2009). Because we find clear and convincing evidence supports the court's determination that the length of Justin's prison sentence will deprive the children of a normal home for a period of years, we do not address whether the nature of Justin's felonies prove him unfit to have custody or control of the children in the future. See § 8-533(B)(4).

¶6 In *Michael J. v. Arizona Department of Economic Security*, our supreme court addressed termination of parental rights under § 8-533(B)(4), declining to adopt a "'bright line' definition of when a sentence is sufficiently long to deprive a child of a normal home for a period of years." 196 Ariz. 246, ¶ 29, 995 P.2d 682, 687-88 (2000). Instead, juvenile courts are directed to 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. The inquiry is "an individualized, fact-specific" one, and "there is no threshold level under each individual factor in *Michael J.* that either compels, or forbids, severance." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 15, 153 P.3d 1074, 1079 (App. 2007). A lack of evidence on one or several of the *Michael J.* factors does not necessarily require reversal. *Id.*

¶7 The juvenile court identified and considered each of these factors in its termination order, and it concluded Aryn had met her burden of proving termination is warranted under § 8-533(B)(4)

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and is in the children's best interests. On appeal, Justin argues the court gave insufficient weight to his bond with his children; failed to consider Aryn's refusal to allow in-person visitation as "the only reason" his parent-child relationship has been weakened by his incarceration; improperly "speculat[ed]" that A.R.S. § 25-403.05 would "act as a serious impediment to the children being able to have a normal parent-child relationship with their father"³; failed to identify whether it considered Justin's five-year prison sentence, followed by drug rehabilitation and probation, "as a positive or a negative" in the calculus of its decision; and erred in terminating his parental rights when the children have suffered "little negative effect" from his incarceration, due to Aryn's ability "to provide a normal home life" for them.⁴

¶8 Justin also contends the court's finding of best interests was not supported by sufficient evidence. Relying on *Lawrence R. v. Arizona Department of Economic Security*, he maintains that "the mere fact that [the children] are adoptable is not enough" to establish termination is in their best interests, and he argues the finding was

³Section 25-403.05(A) provides, in relevant part, "Unless the court finds that there is no significant risk to the child and states its reasons in writing, the court shall not grant a person sole or joint legal decision-making of a child or unsupervised parenting time with a child if the person . . . [i]s a registered sex offender."

⁴Justin also argues evidence was insufficient to find the felonies he committed "[are] of such nature as to prove" that he is unfit to parent in the future, § 8-533(B)(4), noting that he was not convicted of "molestation or sexual abuse of any child" and arguing the court "did not provide him any opportunity to rebut [a] presumption" of unfitness based on his convictions. These arguments appear related to the juvenile court's finding that "[t]he nature of these offenses and the requirement for sex offender registration proves the unfitness of [Justin] to have future custody and control of the children for at least 5 more years following his release from incarceration pursuant to the terms of his plea agreement." This finding is not essential to the court's termination of Justin's parental rights, and we therefore do not address these arguments. *See supra* ¶ 8.

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precluded by his bond with them. 217 Ariz. 585, ¶ 8, 177 P.3d 327, 329 (App. 2008).

¶9 To a large extent, Justin is asking this court to reweigh the evidence and substitute its judgment for the considered judgment of the juvenile court, which we will not do. *Bennigno R. v. Ariz. Dep't of Econ. Sec.*, 233 Ariz. 345, ¶ 31, 312 P.3d 861, 867 (App. 2013). With respect to his other arguments, evidence supported the court's finding that the family law court – not Aryn acting unilaterally – had limited Justin's parenting time rights to telephonic contact, and he provided no evidence that he challenged that ruling. And we cannot agree that the court erred in finding § 25-403.05 will create an "impediment" to Justin's ability to act as a custodial parent in the future. Before being granted unsupervised visitation after his release, Jason would be required to obtain a court's written findings that he poses no significant risk to the children. *See* § 25-403.05(A). Whether or not Justin would be successful in such an effort may be a matter of speculation, but the "impediment" imposed by the statute is a fact.⁵ We also reject Justin's suggestion that the fifth and sixth factors identified in *Michael J.* should have weighed against termination because Aryn's ability to provide the boys with a normal home life mitigated the effect his imprisonment had on them. *See In re Maricopa Cty. Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986) ("The 'normal home' referred to in the statute relates to respondent's obligation to provide a normal home, a home in which the respondent natural father has a presence, and it does not refer to a 'normal home' environment created by [others]."). And we have no doubt the court considered the length of Justin's sentence as a factor weighing in favor of termination, in light of its reference to his five-year prison term followed by post-release requirements of drug rehabilitation "for an unspecified period of time," sex offender probation for at least five years and possibly life, and sex offender registration. *See also Christy C.*, 214 Ariz. 445, ¶ 21, 153 P.3d at 1081

⁵ Impediment is defined as "[s]omething that impedes; a hindrance or obstruction." *The American Heritage Dictionary* 881 (5th ed. 2011).

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(alleged lack of detail in juvenile court’s findings waived by parent’s failure to object below).

¶10 Finally, Justin is mistaken that *Lawrence R.* stands for the proposition that an adoptive plan for a child is insufficient to support a finding that termination is in the child’s best interests. In addressing a jury instruction that misstated applicable law, the court in *Lawrence R.* explained that, although a best-interests finding may be based on “credible evidence that the child is adoptable,” a factfinder is not “require[d]” to conclude termination is in a child’s best interests whenever such evidence is presented. 217 Ariz. 585, ¶ 8, 177 P.3d at 329; see also *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶¶ 16-17, 365 P.3d 353, 356-57 (2016) (adoption plan for child may support best-interests finding in private termination proceeding).

¶11 Because the juvenile court’s ruling includes “thorough findings of fact and sustainable conclusions of law with respect to both the statutory grounds for severance and the children’s best interests,” and because the court’s findings are well-supported by the record, “little would be gained by our further ‘rehashing the trial court’s correct ruling.’” *Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08, quoting *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Instead, we incorporate the court’s analysis in this decision.

Disposition

¶12 For the foregoing reasons, we affirm the juvenile court’s order terminating Justin’s parental rights to S.M. and J.M.