

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

FILED BY CLERK

MAY 13 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

EJERZAETH F.,)	2 CA-JV 2009-0115
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, CHAINING S., and CHASE S.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD-200800144

Honorable Joseph R. Georgini, Judge

AFFIRMED

The Law Office of Kathleen E. Gratz, P.L.L.C.
By Kathleen E. Gratz

Florence
Attorney for Appellant

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BRAMMER, Judge.

¶1 In this appeal, Ejerzaeth F., father of twins Chaining S. and Chase S., challenges the juvenile court’s order terminating his parental rights pursuant to A.R.S. § 8-533(B)(4), after a contested hearing at which the court found that Ejerzaeth has been deprived of his civil liberties due to a felony conviction, his sentence is of such a length that the children will be deprived of a normal home for a period of years, and he does not have any meaningful relationship with the children. He contends the Arizona Department of Economic Security (ADES) discontinued reunification services without prior approval of the court and the court erred in finding his prison term is of such a length that the children will be deprived of a normal home for a period of years. We affirm for the reasons stated below.

Factual and Procedural Background

¶2 The children were born in April 2007, while the mother, Amanda Z., was living in Pennsylvania.¹ She moved to Arizona in June 2007 and began living with Eva M., the maternal grandmother, and Eva’s husband. Amanda and the children moved into the home next door to the grandmother’s in September 2008. Eva and her husband filed a private dependency petition on November 3, 2008, alleging the children were with the grandparents at least “50% of the time . . . at least 3-4 nights a week.” They alleged further that Amanda was addicted to methamphetamines and was unable to parent the children. In November 2008, at an initial dependency hearing, ADES was substituted in as the petitioner, filing an amended petition in December in which it alleged Ejerzaeth

¹Amanda’s parental rights also were terminated. She appealed, and this court affirmed the juvenile court’s order. *Amanda Z. v. Ariz. Dep’t of Econ. Sec.*, No. 2 CA-JV 2009-0114 (memorandum decision filed Feb. 17, 2010).

had abandoned the children. Ejerzaeth submitted the issue of dependency to the juvenile court in April 2009, and the children were adjudicated dependent as to him.

¶3 The initial case-plan goal was reunification of the family. But after a permanency planning hearing on May 13, 2009, the juvenile court changed the plan to severance and adoption and directed ADES to file a motion for termination of parental rights. ADES subsequently filed its motion, alleging abandonment and incarceration as grounds. *See* § 8-533(B)(1), (B)(4). After three days of hearings in August and October, the court terminated both parents' rights; as to Ejerzaeth, the court terminated his rights based on the period of his incarceration. The court found that the children were bonded with Eva, who wished to adopt them, and that termination of the parents' rights was in the children's best interests. This appeal followed.

Discussion

¶4 Before the juvenile court may terminate parental rights, it must find that clear and convincing evidence establishes the existence of at least one of the statutory grounds for termination, and that a preponderance of the evidence establishes termination is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). On appeal, we view the evidence and all reasonable inferences in the light most favorable to upholding the court's order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We do not reweigh the evidence presented to the court because, as the trier of fact, that 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, ¶ 4, 100

P.3d 943, 945 (App. 2004). Consequently, we will affirm the order if reasonable evidence supports the factual findings upon which it is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). But we review questions of law de novo. *See Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 1, 200 P.3d 1003, 1005 (App. 2008).

¶5 Ejerzaeth testified at the termination hearing that he had been convicted of possession of dangerous drugs and drug paraphernalia and placed on probation. Shortly after he last saw the children in September 2008, he was arrested and incarcerated for violating the terms of probation. He admitted having violated probation and, in January 2009, the trial court revoked probation and sentenced him to two and a half years' imprisonment. His earliest possible release date is January 2011, although he could remain imprisoned until May 2011.

¶6 A juvenile court may terminate a parent's rights pursuant to § 8-533(B)(4) when "the parent is deprived of civil liberties due to the conviction 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." In evaluating whether the length of a person's prison term is sufficient to justify termination, the court must consider all relevant circumstances, including, but not limited to, the following:

- (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. After considering those and other relevant factors, the trial court can determine whether the sentence is of such a length as 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, 251-52, 995 P.2d 682, 687-88 (2000).

¶7 Here, the juvenile court expressly found facts existed establishing the relevant elements of the statute. It also found Ejerzaeth had not developed “any meaningful relationship with [his] children.” And, we infer any other findings necessary to sustain the court’s ruling. *See Marco C. v. Sean C.*, 218 Ariz. 216, n.3, 181 P.3d 1137, 1141 n.3 (App. 2008). There is sufficient evidence to support the court’s findings and the termination of Ejerzaeth’s parental rights on this ground. The record establishes Amanda and Ejerzaeth were married when she gave birth to the children. Nonetheless, Ejerzaeth did not see the children until they were about six months old. Between that time and his incarceration, he had visited them a total of only six or seven times and conceded he never had provided support for them and had not developed a bond with them. The last time he had seen them before he was incarcerated was in September 2008, when they were a year-and-a-half old. As ADES notes, Ejerzaeth will have been incarcerated for sixty percent of their lives by his earliest possible release date of January 2011.

¶8 Ejerzaeth also contends ADES “err[ed] in discontinuing services for family reunification . . . without prior court order.” Ejerzaeth does not develop this argument but “adopts by reference” Amanda’s argument in her appeal. First, as ADES points out, the two appeals were not consolidated; therefore, Amanda is not a party to this appeal,

and Ejerzaeth cannot adopt the arguments in her opening brief. *See* Ariz. R. Civ. App. P. 13(f); Ariz. R. P. Juv. Ct. 106(A) (Rule 13, Ariz. R. Civ. App. P, applies in appeals from final orders of juvenile court). Consequently, Ejerzaeth has abandoned this issue by failing to argue it properly on appeal. Ariz. R. Civ. App. P. 13(a)(6); Ariz. R. P. Juv. Ct. 106(A).

¶9 But even assuming *arguendo*, he could adopt Amanda’s arguments, we rejected this claim in our memorandum decision affirming the termination of Amanda’s parental rights. *See Amanda Z. v. Ariz. Dep’t of Econ. Sec.*, No. 2 CA-JV 2009-0114, ¶¶ 6-9 (memorandum decision filed Feb. 17, 2010). Additionally, Amanda’s arguments were tailored to her circumstances, which included, as Ejerzaeth acknowledges, the allegation that she had a “drug problem.” Having failed to develop this argument as it relates to his circumstances, including his incarceration, he has abandoned the claim. *See* Ariz. R. Civ. App. P. 13(a)(6); Ariz. R. P. Juv. Ct. 106(A).

¶10 Finally, this claim necessarily fails because the record supports the juvenile court’s termination of his rights based on the fact and length of Ejerzaeth’s incarceration and the court’s conclusion that reunification services would be futile. Termination of his rights under such circumstances was not an abuse of discretion. *See James H. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 1, ¶ 9, 106 P.3d 327, 329 (App. 2005) (finding no constitutional requirement to provide reunification services when termination based on incarceration, which such services “could [not] ameliorate”); *Mary Ellen C. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 185, ¶ 1, 971 P.2d 1046, 1048 (App. 1999) (finding ADES need not provide services that would be futile).

¶11 For the reasons stated herein, we affirm the juvenile court's order terminating Ejerzaeth's parental rights.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge