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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEON W., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ARIANNA M., Appellees.	2 CA-JV 2009-0018 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18588400

Honorable Ted B. Borek, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 Deon W., father of Arianna M., born in July 2007, appeals from the juvenile court's order terminating his parental rights to Arianna based on his felony conviction and the length of his resulting term of incarceration.[1] *See* A.R.S. § 8-533(B)(4) (termination may be justified if "parent is deprived of civil liberties due to the conviction of a felony" and "the sentence . . . is of such length that the child will be deprived of a normal home for a period of years"). For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent's rights only if it finds by clear and convincing evidence that a statutory ground for severance exists and finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *see also Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On review, "we will accept the juvenile 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, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Deon, who was never married to Arianna's mother, was incarcerated in California when Arianna was born. From October 2007 to January 2008, Deon provided care and support for Arianna while he lived with her and her mother. In January 2008, Deon was

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[1]The parental rights of Arianna's mother, who is not a party to this appeal, were also terminated.

arrested for violating his California parole. He was later convicted of promoting prison contraband and was sentenced in October 2008 to a four-year prison term, less 277 days' presentence incarceration credit. In February 2008, Child Protective Services (CPS) received a report that the mother, who had recently sold cocaine to an undercover police officer, had neglected then-seven-month-old Arianna. Arianna was removed from the mother's custody in March 2008, after her mother agreed to place Arianna with her maternal grandparents. Arianna has subsequently remained with her grandparents, where she lives with her two half-siblings.

¶4 Also in March 2008, the Arizona Department of Economic Security (ADES) filed the first of several dependency petitions, alleging as to Deon that he had prior felony convictions, had a history of using crack cocaine and selling drugs, and was currently incarcerated. In July 2008, after Deon's paternity of Arianna had been established, Deon admitted the allegations in an amended dependency petition, and the juvenile court adjudicated Arianna dependent as to him. The court approved a case plan goal of family reunification and ordered ADES to "make reasonable efforts and implement the services outlined in the case plan . . . to facilitate the goal of reunification." In September 2008, the mother was sentenced to a 2.5-year prison term. Due to both parents' incarceration, ADES filed a motion to terminate their rights to Arianna in October 2008, alleging pursuant to § 8-533(B)(4) that Arianna would be "deprived of a normal home for a period of years" and that termination was in her best interests. Following a two-day contested severance hearing in January 2009, the court terminated both parents' rights to Arianna.

¶5 Deon correctly argues that § 8-533(B)(4) does not define when a prison sentence is sufficiently long to deprive a child of a normal home "for a period of years." However, in *Michael J.*, 196 Ariz. 246, ¶ 29, 995 P.2d at 687-88, our supreme court set forth relevant factors a juvenile court should consider in determining whether a given prison sentence will deprive a child of a normal home for a period of years. 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.

Id.

¶6 Citing *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 14, 153 P.3d 1074, 1079 (App. 2007), a case that relies on *Michael J.*, the juvenile court explained its reasons for terminating Deon's parental rights as follows:

> When Arianna was taken into D.E.S. legal custody and placed with her maternal grandparents[,] she was only about seven . . . months old. She is now about one and a half . . . years old. Her mother was her primary caretaker for her first seven . . . months[,] though the father also provided some care and support with the mother for about three . . . months. With the admitted substance abuse by the mother and father during the first seven months of Arianna's life, this Court concludes that there was not a strong relationship with either the mother or father, though the mother's relationship with Arianna was clearly stronger tha[n] the father's. The father's four . . . year incarceration from January 2008 until his release date in about January 2012, and

> the mother's two and a half . . . year sentence extending from September 2008 until about March 2011[,] in addition to the period of February to September 2008 when the child was in C.P.S. custody[,] demonstrates a minimal relationship between the child and both the father and mother. . . . For the father, the period of care would be at most only three . . . months in about four and one-half . . . years or three months out of . . . forty-four[] months if released early in March 2011. For such a young child the relationship between child and parents is virtually non-existent, and neither parent has provided a normal home for a period of years. The likelihood of continuing and nurturing a child of such a tender age from prison where she is having no visits with her parents is minimal. Clearly, no parent is available to parent Arianna[,] who is attached to her maternal grandparents and living with two . . . older siblings.

¶7 Deon does not directly challenge the juvenile court's factual findings. Rather, he argues that some of the *Michael J.* factors were not sufficiently satisfied to justify termination. He first contends that, because CPS did not bring Arianna to visit him in prison, he could not maintain a relationship with her during his incarceration. Contrary to Deon's argument that CPS's duty to provide him with reunification services included bringing Arianna to visit him in prison, § 8-533(D) imposes no duty to provide reunification services when termination is based on length of sentence. *See James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶¶ 1, 6, 106 P.3d 327, 327, 328 (App. 2005). In addition, according to CPS supervisor Max Arduno, CPS services do not include providing visitation with parents in prison "because it is not conducive to [the] mental health [of young children or infants]." Moreover, according to Arduno, Deon never asked that Arianna visit him in prison, nor did he send her any letters, gifts, or cards or request a picture of her.

¶8 Deon also argues that Arianna's age did not favor termination. He contends Arianna "will still be a young child [upon his release] and many years of her childhood will be remaining for Deon to be a parent to her." The juvenile court noted, however, that, by the time he was released, Deon would have spent only three months with Arianna during her four-year life, a very short time for a child of Arianna's "tender age." Arduno testified at the severance hearing that he had concerns about Deon's ability to care for Arianna, that there had been "no interaction" between father and child since the inception of the dependency, and that "[t]here is nothing to base an ongoing relationship on." Arduno opined that Arianna is bonded to her maternal grandparents and half-siblings with whom she has lived throughout the dependency. The court reasonably concluded that, given Arianna's young age and the absence of any meaningful relationship with Deon, those two factors were among those weighing in favor of severance.

¶9 Deon also contends that the three years remaining on his sentence at the time of the severance hearing "is not a length of time . . . that warrants termination of parental rights." In effect, he is arguing the juvenile court did not properly consider the fourth factor in *Michael J.*, the length of his sentence. Deon testified that his earliest possible release date is in September 2010. But, the court was required to "consider the entire length of the sentence and not whether the parent may be parole eligible within that time." *See James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, n.3, 972 P.2d 684, 687 n.3 (App. 1998). In addition, the court is to consider not merely the amount of time remaining on the parent's sentence as of the severance proceeding but, rather, the "total length of time the parent [will

have been] absent from the family." *Jesus M.*, 203 Ariz. 278, ¶ 8, 53 P.3d at 206. The juvenile court did just that.

¶10 Finally, Deon claims that, even though no other parent was available to provide a normal home for Arianna, because he believed she could remain with her maternal grandparents "as long as she needed to," termination was not necessary. As the court noted in *Christy C.*, "A key point that *Michael J.* made was that *all* relevant factors needed to be considered as part of the severance inquiry. . . . [However, 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.*, 214 Ariz. 445, ¶ 15, 153 P.3d at 1079. Therefore, even assuming we found Deon's arguments on these factors persuasive, the evidence taken as a whole supports the juvenile court's finding that Deon's four-year sentence would deprive Arianna of a normal home for a period of years and that severing his rights was justified pursuant to § 8-533(B)(4).

¶11 Therefore, we affirm the juvenile court's order terminating Deon's parental rights to Arianna.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge