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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 8/13/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

MELISSA R., ) 1 CA-JV 13-0049  
)  
Appellant, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz. R.P. Juv. Ct. 103(G);  
SECURITY, M.R., ) ARCAP 28)  
)  
Appellees. )  
)

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Appeal from the Superior Court in Yavapai County

Cause No. P1300JD201100071

The Honorable David L. Mackey, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Tucson  
by Laura J. Huff, Assistant Attorney General  
Attorneys for Appellees

Law Office of Florence M. Bruemmer, P.C. Anthem  
by Florence M. Bruemmer  
Attorney for Appellant

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**W I N T H R O P**, Judge

¶1 Melissa R. ("Mother") appeals the termination of her parental rights to M.R. ("Child"). Mother argues that the Arizona Department of Economic Security ("ADES") failed to make

reasonable efforts to provide her with reunification services, the juvenile court erred in terminating her parental rights on neglect and time-in-care grounds, and the court erred in determining that severance was in Child's best interest. For the following reasons, we affirm.

#### **BACKGROUND**

¶2 Mother and William R. ("Father")<sup>1</sup> are the biological parents of Child, who was born in 1999. On August 30, 2011, Child Protective Services ("CPS") temporarily removed Child from the parents' home after CPS received a report that Father had sexually abused his thirteen-year-old daughter, Child's half-sister ("Sister"), in December 2010 and August 2011. The report further alleged that, during the August 2011 incident, Father gave Sister the narcotic painkiller Vicodin.

¶3 During the December 2010 incident, Father entered Sister's room and lay beside her on the bed with his arm around her waist. Father then rolled on top of her, put his hands on her face, and kissed her, inserting his tongue in her mouth. Sister pushed Father off and ran away, reporting the incident to her step-brother ("Brother") and Child.

¶4 On August 27, 2011, while Mother was at work, Father gave Sister two prescription Vicodin pills. Several hours

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<sup>1</sup> The juvenile court also terminated Father's parental rights to Child, and he is not a party to this appeal.

later, while Sister was sitting at the computer, Father began rubbing Sister's shoulders and touching her stomach and breasts. Sister moved his hand away and retreated to her room to escape the situation and to lie down because she felt tired and nauseated from the pills Father had given her. Shortly thereafter, Father entered Sister's room and insisted on lying next to her. Father spread Sister's legs apart and began moving his hand up her shorts and inside her panties. Father then touched her perineum on the outside of her panties. Sister yelled at Father and ran out of the house, screaming. Father chased Sister outside, stopped her in the driveway, picked her up, and dragged her back inside. Sister again left the house and contacted three of her friends to report the incident. Father eventually found Sister and took her home. Sister refused to personally speak with Father, but they exchanged several text messages regarding the incident. Sister later went to a friend's house, and a few days later the Yavapai County Sheriff's Office and CPS were contacted.

¶15 During the ensuing investigation, two of the friends Sister had called the day of the incident corroborated Sister's account. Additionally, Brother confirmed that Father and Sister often were in Sister's room with the door closed, Father had given Sister two unknown pills on the day of the incident, Sister had previously reported that Father had touched her

breasts, and Sister told him that she had run away because Father attempted to "finger her." Child also reported that Sister told her about Father's touching and kissing. Child became emotional and unwilling to talk, however, when asked if anything had ever happened to her. Child stated that Father would lie in bed next to her when she was sick, but according to the interviewing detective, she seemed "very uncomfortable" talking about it. During a police interview, Father admitted kissing Sister on the mouth in December 2010, giving Sister two pain pills that may have been his prescribed Vicodin pills, accidentally touching Sister's breasts, and possibly touching Sister's "ass" in her sleep.

¶6 Mother, who works out of town, had been at work during both incidents. When she learned the children were to be interviewed by the police, Mother texted the children and told them to "delete all text messages, including this one." When asked about her reason for sending the texts, Mother could not provide a logical explanation. Instead, Mother contended that Sister was lying, and she attacked Sister's character. Mother also acknowledged, however, that she had seen Father lie in bed with Sister and Child "when they were sick." Despite the statements of Sister's friends and siblings, as well as Father's admissions, Mother and Father continued to deny all allegations of sexual abuse.

¶7 On September 2, 2011, ADES filed a dependency petition, alleging Child dependent as to both parents. With regard to Mother, ADES alleged she had neglected Child by failing to protect her from sexual abuse by Father because Mother knew or should have known that Father had been sexually inappropriate with Sister, and yet Mother continued to leave Child with Father despite Father's inappropriate sexual behavior. The court found Child dependent as to her parents and placed Child in the custody and control of CPS. To effectuate a case plan of reunification, ADES offered Mother a substance abuse assessment and education, random urinalysis and hair follicle testing, a psychological evaluation, family and individual counseling, a clinical family assessment, a parent aide for supervised visitation, parenting classes, chaperone classes, team decision meetings, and child and family team ("CFT") meetings.

¶8 In December 2011, the case manager reported that Mother had completed a substance abuse assessment, participated in supervised visitations with Child, and participated in CFT meetings. However, a parent home study had not been completed because of Mother's failure to meet with the evaluator. Additionally, Mother had declined to participate in a psychological evaluation, refused to submit to random urinalysis and hair follicle testing, and had not completed chaperone or

parenting classes. The juvenile court granted CPS discretion to allow Mother unsupervised and overnight visits with Child, but ordered that no other family members (including Father) be allowed unsupervised contact with the Child.

¶9 By March 2012, CPS had authorized Mother to have unsupervised visits with Child. In its March 8 case report, CPS noted that Mother had completed the clinical family assessment and was engaged in family therapy. However, Mother had not completed the recommended substance abuse education, parenting or chaperone classes, or individual therapy. Mother had also failed to obtain health insurance and continued to decline urinalysis and hair follicle testing. Additionally, Arizona Families F.I.R.S.T. reported that it had closed Mother's case concerning her substance abuse education and parenting classes due to Mother's missed appointments and lack of participation.

¶10 In the meantime, Mother and Father were experiencing significant marital issues, and Father was reportedly abusing illegal substances. Mother reported that she had separated from Father and he had moved in with a seventeen-year-old girl whom he had impregnated. Mother later informed the CFT that her prior report was a misunderstanding and she was back together with Father. Subsequently, Mother again reported that Father had moved in with the same seventeen-year-old and she was going to call the State's child abuse hotline to report the situation.

Five days later, Mother reported that she had again misunderstood the situation and claimed that Father did not have a relationship with the seventeen-year-old girl and did not father her child. The case worker later discovered that Mother had told Child that Father had impregnated the seventeen-year-old girl. Based on Mother's actions and behavior, the case manager strongly suggested to Mother that she complete a psychological evaluation and comply with family therapy, parenting classes, and chaperone classes. Subsequently, the juvenile court ordered Mother to participate in a psychological evaluation.

¶11 In her September 21, 2012 report, the case manager noted that unsupervised visits between Mother and Child had become more sporadic and Mother had cancelled approximately fifty percent of her Sunday visits, reportedly due to Mother's work schedule. The case manager also noted that "little progress has been made in the family dynamic since the inception of this Dependency." Furthermore, CPS discovered that Mother had informed Child that Father was incarcerated despite Mother's representations to CPS that he was working "out of town" and "living with family out of state."<sup>2</sup> The case manager further

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<sup>2</sup> Father was arrested on July 21, 2012, when, after having dinner with Mother, he discharged a gun into the air during an altercation with a group of people in the restaurant parking lot. Father, a prohibited possessor, pled guilty to disorderly

indicated that CPS had repeatedly offered to refer Mother for individual therapy but Mother always declined and stated that she was meeting her needs through family therapy sessions with Child. The case manager expressed to Mother the importance of completing individual therapy, family therapy, and parenting and chaperone classes if she wanted to continue to pursue reunification with Child.

¶12 Due to Father's recent release from jail and the erratic behavior demonstrated by Mother and Father, CPS decided to conduct an unannounced home visit to ensure the safety of Child during a visit with Mother. On September 25, 2012, CPS and law enforcement officers arrived at Mother's home, where they found Mother, Father, and Child eating dinner together. Sheriff's deputies arrested Father for violating the court's order prohibiting him from having any unsupervised contact with Child and for violating his probation.<sup>3</sup> While being transported back to her foster home, Child stated she had been in contact with Father "all along" during her visits with Mother.

¶13 In her September 28, 2012 report, the case manager noted concerns regarding Mother by Child's family therapist, who

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conduct with a deadly weapon and was placed on three years' intensive probation.

<sup>3</sup> During a search of the home, police found a rifle, sword, dagger, other knives, and ammunition in the home, despite Father's status as a prohibited possessor.



stated that Mother had not been forthcoming during recent sessions and their sessions had become "shallow and non-productive." During sessions, Mother denied any concern for Child's behaviors, but Child had described two self-harming incidents that Mother had not disclosed. In the first incident, Child and a friend poured salt and baking soda on their stomachs to see who could endure the pain the longest. The second incident involved Child burning the back of another friend's hand with a rubber eraser, and allowing her friend to perform the same act on her. In both incidents, Child received burn marks resulting in scabs on her skin. Out of concern for Child and because of Mother's unproductive therapy sessions, the therapist requested permission to end the family therapy sessions and continue only with individual sessions focusing on Child's needs.

¶14 At the report and review hearing on October 2, 2012, counsel for Child indicated that Child wanted to be adopted by her current foster family. The juvenile court found that non-therapeutic visits with Mother would be detrimental to Child's mental health and ordered that visitation with Mother be limited to therapeutic visits only, and not more than once a week. The juvenile court also ordered the case plan changed to severance. ADES subsequently filed a petition to terminate Mother's

parental rights on the grounds of neglect and nine months or longer out-of-home placement.<sup>4</sup>

¶15 On October 23, 2012, Mother participated in a psychological evaluation. During the evaluation, Mother continued to blame Sister and deny Sister's allegations against Father. The interviewing psychologist stated that Mother seemed "somewhat guarded," defensive, and "not inclined to disclose" any issues. The psychologist also concluded that Mother's psychological tests and assessments were not likely to be meaningful because Mother had been "inadequately forthcoming" during much of the evaluation. The psychologist diagnosed Mother with a dependent personality disorder, depressive disorder not otherwise specified ("NOS"), anxiety disorder NOS, and a partner relation problem. The psychologist stressed in part the importance of Mother being "transparent and credible in her statements," and he recommended that Child not be placed in Mother's care if Father was in the home and that Child be placed in a safe and secure environment.

¶16 On December 20 and 27, 2012, the juvenile court held an evidentiary hearing, after which it terminated Mother's parental rights to Child on all three grounds alleged by ADES. We have appellate jurisdiction over Mother's appeal pursuant to

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<sup>4</sup> The juvenile court later granted ADES's request to amend the termination petition, adding the ground of fifteen months or longer out-of-home placement as a basis for severance.

Arizona Revised Statutes ("A.R.S.") sections 12-2101(A)(1) (West 2013)<sup>5</sup> and 8-235(A).

#### ANALYSIS

¶17 Mother argues that the juvenile court erred in terminating her parental rights to Child because (1) ADES failed to make reasonable efforts to reunify the family, (2) ADES failed to prove Mother neglected or wilfully abused Child, (3) Mother remedied the circumstances that caused Child to be in an out-of-home placement, and (4) insufficient evidence demonstrated that severance is in Child's best interest.

¶18 The right to custody of one's children is fundamental, but it is not absolute. See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). A court may order severance of parental rights under certain circumstances, as long as the parents whose rights are severed have been provided with "fundamentally fair procedures" that satisfy due process requirements. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)). To justify termination of the parent-child relationship, the juvenile court must find, by clear and convincing evidence, at least one of the statutory grounds set out in A.R.S. § 8-533(B). *Michael J.*, 196

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<sup>5</sup> We cite the current version of the applicable statutes unless changes material to our analysis have since occurred.

Ariz. at 249, ¶ 12, 995 P.2d at 685. The court must also find by a preponderance of the evidence that termination is in the best interests of the children. *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022.

¶19 In general, we will affirm a severance order unless the findings underlying it are clearly erroneous. See *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002); *Maricopa Cnty. Juv. Action No. JS-4374*, 137 Ariz. 19, 21, 667 P.2d 1345, 1347 (App. 1983). In conducting our analysis, we review *de novo* questions of law, including the application of statutes and rules. See *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 210, ¶ 18, 181 P.3d 1126, 1131 (App. 2008); *Maricopa Cnty. Juv. Action No. JV-507879*, 181 Ariz. 246, 247, 889 P.2d 39, 40 (App. 1995).

#### **I. Reasonable Efforts to Reunify**

¶20 Mother argues that ADES did not make a reasonable effort to provide her with reunification services because CPS stopped visitation and services at the end of September 2012, failed to provide her with individual counseling, failed to provide chaperone classes in Maricopa County, and failed to make referrals for Mother to attend the required classes outlined in the case plan. Based on the facts and findings of the juvenile court, we disagree.

¶21 The duty to make diligent or reasonable efforts to provide appropriate reunification services may arise through statute, see A.R.S. § 8-533(B)(8) and (11), or through case law based on the recognition of a parent's fundamental rights. See *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 191-92, ¶¶ 29-34, 971 P.2d 1046, 1052-53 (App. 1999) (holding that, before a severance based on mental illness under A.R.S. § 8-533(B)(3) may be granted, ADES must demonstrate either that it has made a reasonable effort to preserve the family or that the parent is not amenable to any treatment program).

¶22 Subsection (B)(2) of A.R.S. § 8-533, allowing severance based on neglect or willful abuse, contains no express language requiring ADES to make diligent efforts to provide reunification services before severance, however, and no Arizona court has previously read such a requirement into that subsection. Cf. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 510, ¶ 11, 200 P.3d 1003, 1007 (App. 2008) (recognizing that "neither § 8-533 nor federal law requires that a parent be provided reunification services before the court may terminate the parent's rights on the ground of abandonment"); *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶¶ 6-8, 106 P.3d 327, 328 (App. 2005) (concluding that the legislature has not imposed a statutory duty on ADES to provide reunification services for a subsection (B)(4) severance and

that no constitutional mandate to undertake reunification efforts may exist unless there is a reasonable prospect of success); *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, 64, 66, ¶¶ 9, 15, 993 P.2d 462, 465, 467 (App. 1999) (recognizing that the legislature amended § 8-533(B) to remove the requirement that services be provided before termination on the ground of abandonment under A.R.S. § 8-533(B)(1), and finding no constitutional duty to provide services before seeking termination on that ground).

¶23 Nevertheless, even if we assume *arguendo* that ADES was required to provide Mother with appropriate reunification services, reasonable evidence supports the juvenile court's finding that ADES "made a diligent effort to provide appropriate reunification services" before Mother's parental rights were terminated.

¶24 In general, ADES's mandate is to offer parents "the time and opportunity to participate in programs designed to help [them] become [] effective parent[s]." *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). Even when ADES has a duty to provide reunification services, however, ADES is not required to provide every conceivable service, and a parent's failure or refusal to participate in the services offered or recommended by ADES does not foreclose termination of the parent's parental rights. *Id.*

Additionally, ADES need not undertake futile rehabilitative measures, but only those that offer a reasonable possibility of success. *Mary Ellen C.*, 193 Ariz. at 187, ¶ 1, 971 P.2d at 1048. Further, although a parent is entitled to reasonable visitation in dependency proceedings, the juvenile court may deny visitation to ensure a child's physical, mental, moral, or emotional health. *Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994).

¶25 Beginning with the first hearing on September 9, 2011, ADES offered numerous services designed to help Mother attain the initial case plan goal of reunification. These services included a substance abuse assessment and education, random urinalysis and hair follicle testing, a psychological evaluation, family and individual counseling, a clinical family assessment, supervised and unsupervised visitation, parent aide services, parenting and chaperone classes, and team decision making and CFT meetings. Although Mother claims that some of these services were inconvenient and difficult for her to attend, Mother simply refused to participate in or failed to complete many of these services, including substance abuse education, urinalysis and hair follicle testing, individual counseling, and parenting and sex offender chaperone classes. The supportive service providers repeatedly expressed to Mother the importance of participating in the services in order to

reunify with Child. Furthermore, the case manager continually encouraged Mother to utilize the services, but Mother failed to consistently do so.<sup>6</sup>

¶26 Moreover, the record reflects that Mother had made little if any progress toward reunification and improving the family dynamic since inception of the dependency. As of September 2012, approximately one year after the dependency began, Mother had only completed a substance abuse assessment and clinical family assessment and participated in family therapy (CFT meetings) and visitation. The record further indicates that the stoppage of services and visitation were attributable to Mother's own conduct. Mother's failure to productively participate in family therapy, her inability or unwillingness to keep Father away from Child, and her inability to arrange and partake in other services caused the eventual suspension of services and visitation.<sup>7</sup> Based on the record and the juvenile court's factual findings, ADES provided Mother with

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<sup>6</sup> For Mother's convenience, ADES referred Mother to two different chaperone classes, but Mother never completed the classes. Additionally, ADES offered to pay for individual therapy because Mother did not have insurance, but Mother did not participate in individual counseling.

<sup>7</sup> As noted, in the case manager's September 28, 2012 report, the family therapist requested that family therapy sessions end and Child continue with individual therapy because the sessions with Mother had become non-productive. Moreover, the same report noted that CPS suspended visitation due to the circumstances surrounding the September 25, 2012 unannounced home visit.



ample time, opportunity, and services in an effort to reunify the family and to help her remedy the circumstances that led to the dependency.

## **II. Neglect**

¶27 Mother next argues that insufficient evidence supports the juvenile court's ruling that she neglected Child by failing to protect her from sexual abuse by Father. We disagree.

¶28 Parental rights may be terminated when a parent has neglected or wilfully abused a child. A.R.S. § 8-533(B)(2). Neglect is defined in part as "[t]he inability or unwillingness of a parent, guardian, or custodian of a child to provide that child with supervision . . . if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(22)(a). Neglect further includes the "[d]eliberate exposure of a child by a parent, guardian or custodian to sexual conduct as defined in § 13-3551 or to sexual contact, oral sexual contact or sexual intercourse as defined in § 13-1401." A.R.S. § 8-201(22)(e).

¶29 When Sister reported Father's inappropriate sexual conduct to the authorities, and despite corroboration from Brother and Child, Mother refused to believe Sister or the investigating officer and instead blamed Sister for the resulting circumstances. Furthermore, Mother knew or should have known about Father's inappropriate behavior with Sister in

December 2010 and that Father would lie in bed with Child in the same manner as alleged by Sister. Nevertheless, as Mother's case manager noted, Mother failed to "implement protective measures that would have protected the children."

¶30 Additionally, despite Mother's professed belief of Father's innocence, before the investigators conducted interviews with the children, Mother sent the children a text ordering them to delete all of their previous text messages. Even more concerning is that Mother, against court orders, allowed Child to have unsupervised contact with Father during her overnight visitation.<sup>8</sup>

¶31 After Mother's psychological evaluation in October 2012, the psychologist explained that Mother's denial of Father's inappropriate behavior translated "to serious questions about whether or not . . . [Mother] can be relied upon to protect her child if necessary." Furthermore, the psychologist opined that Mother was not "on board . . . with the whole concept of protecting [Child] and taking this matter perhaps as seriously as she should have."

¶32 The record suggests that Mother's reluctance to believe the allegations of Father's inappropriate sexual behavior rendered her incapable of providing the proper

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<sup>8</sup> Child disclosed to the psychologist that she had been in contact with Father approximately five times during her overnight unsupervised visitation with Mother.

protection for Child and hindered her ability to remedy the circumstances. Mother's inability to protect Child from Father caused an unreasonable risk of harm to Child's health and welfare. Therefore, we conclude that sufficient evidence exists in the record supporting the juvenile court's finding of neglect.

### **III. Out-of-Home Placement**

¶33 Mother also contends that the juvenile court erred in terminating her parental rights pursuant to A.R.S. § 8-533(B)(8)(a) and (c), the subsections allowing for termination based on cumulative out-of-home placement of nine and fifteen months. However, the existence of any one of the enumerated statutory grounds is sufficient to justify termination. *Maricopa Cnty. Juv. Action No. JS-6520*, 157 Ariz. 238, 242, 756 P.2d 335, 339 (App. 1988). Because we find that reasonable evidence supports termination on the ground of neglect, see A.R.S. § 8-533(B)(2), we need not consider the additional grounds found by the juvenile court. See *Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 575, 869 P.2d 1224, 1228 (App. 1994).

### **IV. Best Interest of Child**

¶34 Mother challenges the juvenile court's finding that termination of her parental rights was in Child's best interest. The juvenile court found that termination of Mother's parental

rights would be in Child's best interest because Child is adoptable and placed in a potential adoptive home, and adoption would provide safety and security for Child that Mother could not provide. We conclude that substantial evidence in the record supports the juvenile court's finding.

¶35 Under A.R.S. § 8-533(B), the court must "consider the best interests of the child." The best interest requirement may be met if, for example, the petitioner proves that a current adoptive plan exists for the child, or even that the child is adoptable. See *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990); *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994).

¶36 In this case, the record reflects that Child is adoptable, willing to be adopted, and currently in a potential adoptive placement. Child's therapist testified that Child is stable in her current placement and if she was adopted, she would be provided permanency and stability. Mother's psychological evaluator opined that Mother could not parent Child or provide her with a safe and secure environment and it would not be in Child's best interest to return to that situation. Moreover, Child has expressed her desire to be adopted by the foster family with whom she is placed. Consequently, reasonable evidence supports the juvenile court's

finding that termination of Mother's parental rights was in Child's best interest.

**CONCLUSION**

¶137 The juvenile court's order terminating Mother's parental rights to Child is affirmed.

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LAWRENCE F. WINTHROP, Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
DIANE M. JOHNSEN, Presiding Judge

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