

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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ROBERT S.,  
*Appellant,*

*v.*

DEPARTMENT OF CHILD SAFETY, A.S.,  
*Appellees.*

No. 1 CA-JV 16-0399  
FILED 5-2-2017

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Appeal from the Superior Court in Maricopa County  
No. JD505857  
The Honorable Arthur T. Anderson, Judge

**AFFIRMED**

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COUNSEL

Gates Law Firm, LLC, Buckeye  
By S. Marie Gates  
*Counsel for Appellant*

Arizona Attorney General's Office, Mesa  
By Ashlee N. Hoffmann  
*Counsel for Appellee DCS*

**MEMORANDUM DECISION**

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Kent E. Cattani joined.

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**J O H N S E N**, Judge:

¶1 Robert S. ("Father") appeals the superior court's order terminating his parental rights to his son. For the following reasons, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Father's son, A.S., was born in February 2015.<sup>1</sup> The child tested positive for amphetamines and marijuana, and the Department of Child Safety ("DCS") filed a dependency petition one week after he was born – making him the fourth of Father's children to be born substance-exposed.<sup>2</sup> The petition alleged Father was unable to parent due to substance abuse, neglect and inability to remedy the circumstances that caused out-of-home placement.<sup>3</sup> Several months later, DCS moved for termination of the parent-child relationship based on Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(3), (8) and (10) (2017).<sup>4</sup>

¶3 The termination trial was held in August 2016. Father testified that he first began using marijuana shortly after high school, and that he recently obtained a medical marijuana card. He testified that DCS

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<sup>1</sup> We view the facts in the light most favorable to affirming the superior court's decision. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13 (App. 2002).

<sup>2</sup> Mother's parental rights were severed in April 2016. She is not a party to this appeal.

<sup>3</sup> At the time of the child's birth, Father's parental rights already had been severed as to two other children, and he had a third child under guardianship and a fourth involved in a dependency case that would end months later in severance.

<sup>4</sup> Absent material revision after the relevant date, we cite a statute's current version.

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asked him to participate in drug testing and substance-abuse treatment, but that he did not do so because he was uncomfortable with urinalysis testing, hair follicle testing and the language used in his substance-abuse treatment class. He also testified that he would have tested positive for marijuana throughout the case.

¶4 The DCS case manager testified that Father was provided reunification services including a case aide, a full parent aide, substance-abuse treatment, drug testing and a psychological evaluation. She testified Father refused to participate in drug testing, including urinalysis, hair follicle and oral swab testing, and that while he completed intake for the substance-abuse treatment program, he did not complete the program. She also testified that although Father did well in his visitations and showed parenting skills during his visits with the child, DCS still had concerns about his ability to parent due to his substance abuse.

¶5 After hearing the evidence, the superior court terminated Father's parental rights on the grounds of drug abuse under A.R.S. § 8-533(B)(3), out-of-home placement under A.R.S. § 8-533(B)(8)(a) and (b), and prior termination under A.R.S. § 8-533(B)(10). This court has jurisdiction of Father's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, A.R.S. § 8-235(A) (2017) and Arizona Rule of Procedure for the Juvenile Court 103(A).

## DISCUSSION

¶6 The right to custody of one's children is fundamental, but not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12 (2000). The superior court may terminate a parent's rights upon clear and convincing evidence of one of the statutory grounds in A.R.S. § 8-533(B) and upon finding by a preponderance of the evidence that termination is in the best interests of the child. *Michael J.*, 196 Ariz. at 249, ¶ 12. We review the superior court's termination order for an abuse of discretion; we will affirm the order unless its factual findings are clearly erroneous, "that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2 (App. 1998).

¶7 One statutory ground for termination is based on out-of-home placement for six months or longer pursuant to A.R.S. § 8-533(B)(8)(b). This ground requires findings that: (1) the child is under three years of age; (2) the child has been in an out-of-home placement for six months or longer; (3) the parent has substantially neglected or willfully refused to remedy the circumstances that caused the out-of-home

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placement; and (4) DCS has made diligent efforts to provide appropriate reunification services. A.R.S. § 8-533(B)(8)(b). In considering the circumstances that cause an out-of-home placement, we look to the circumstances at the time of the severance hearing rather than at the time of the initial dependency petition. *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 22 (App. 2007).

¶8 Father does not dispute the child's age, that the child was in out-of-home care for more than six months or that DCS made diligent efforts to provide appropriate reunification services. Father does seem to argue, however, that his marijuana use does not support the court's findings that he substantially neglected or willfully refused to remedy the circumstances that caused the child's out-of-home placement.

¶9 The superior court found DCS made reasonable efforts to provide Father with drug testing, counseling and parenting classes to support reunification, but that Father largely ignored these efforts. The record supports the court's findings. At trial, Father admitted that he refused to participate in drug testing and that he refused to complete substance-abuse treatment. Father asserts he refused to test because of a "bad experience" with urinalysis testing, and admitted he would test positive for marijuana, which he stated he uses for medical purposes. Father, however, also refused other tests, including an oral swab and a hair follicle test, which would have revealed whether he was using other illegal drugs in addition to marijuana.<sup>5</sup>

¶10 Although "[t]ermination is not limited to those who have completely neglected or willfully refused to remedy such circumstances," *Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571, 576 (App. 1994) (emphasis omitted), the record supports the superior court's finding that, after the child was born substance-exposed, Father substantially neglected or willfully refused to remedy the circumstances that caused the child's out-of-home placement by refusing to submit to drug testing and to complete substance-abuse treatment.

¶11 Because the superior court did not abuse its discretion in severing Father's parental rights based on out-of-home placement, we need

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<sup>5</sup> Even assuming the truth of Father's assertion that he has been issued a medical marijuana card, his possession of that card does not exempt him from drug testing aimed at determining the levels of his marijuana use.

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not consider whether the superior court's findings justified severance based on other grounds. *See Michael J.*, 196 Ariz. at 251, ¶ 27.

¶12 Father also argues that the court erred in finding termination to be in the child's best interests. Whether severance is in the best interests of the child is a question of fact for the superior court. *Jesus M.*, 203 Ariz. at 282, ¶ 13. "A finding that the best interests of the child will be served by removal from a custodial relationship may be established by either showing an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 557 (App. 1997). In making this determination, the superior court may consider the immediate availability of an adoptive placement and whether an existing placement is meeting the needs of the child. *Jesus M.*, 203 Ariz. at 282, ¶ 14.

¶13 The superior court found that the child is in a licensed foster home where his needs are being met, and that the placement is willing to adopt, "giving [the child] stability and permanency." The child's case manager supported this finding; she testified that an adoptive home has been identified, and that the home can "meet the child's physical, social, educational, medical, psychological and emotional needs." Viewed in the light most favorable to upholding the superior court's findings, the record contains reasonable evidence to support the finding that termination is in the child's best interests.

CONCLUSION

¶14 For the foregoing reasons, we affirm the superior court's order terminating Father's parental rights as to the child.



AMY M. WOOD • Clerk of the Court  
FILED: AA