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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 4/16/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

EDWARD B., III, ) 1 CA-JV 12-0254  
)  
Appellant, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ) 103(G) Ariz.R.P. Juv.  
ECONOMIC SECURITY, E.B., ) Ct.; Rule 28 ARCAP)  
)  
Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. JD20409

The Honorable Aimee L. Anderson, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Michael Valenzuela, Assistant Attorney General  
Attorneys for Appellee Arizona Department of Economic Security

Robert D. Rosanelli Phoenix  
Attorney for Appellant

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**H O U S E R**, Judge

¶1 Edward B., III ("Father") appeals the superior court's order terminating his parental rights to his son, E.B. ("Child"). For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

¶2 Child was born on June 13, 2011 exposed to methamphetamine. Jessica G. ("Mother") and Father were not married, and Child Protective Services ("CPS") removed Child from Mother's care.<sup>1</sup> The Arizona Department of Economic Security ("ADES") then filed a petition alleging Child was dependent, which Father contested. In August 2011, the court changed the case plan to in-home dependency and granted ADES's motion to give Father physical custody of Child. Child resided with Father from August 22, 2011 through October 19, 2011.

¶3 Meanwhile, Father was arrested and charged with credit card theft for an incident that occurred in March 2011 when he used a stolen credit card to buy necessities for Mother, who was pregnant with Child at the time, and Mother's four children from a previous relationship. At the time ADES placed child in Father's care, he had not fully disclosed the nature of his criminal history, including the March 2011 offense. Subsequently on October 19, 2011, the court held a contested dependency adjudication hearing after which it found Child dependent as to Father and ordered Child be placed with his maternal aunt and uncle given Father's new criminal charge that would most likely result in a prison sentence. The court also

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<sup>1</sup> The superior court also severed Mother's parental rights. She is not a party to this appeal, however.

modified the case plan to family reunification with a concurrent plan of severance and adoption.<sup>2</sup>

¶4 CPS placed Father on a waiting list before he was provided with supervised visits with Child. Father was provided with a visit in November 2011 and turned down one in December 2011 because he refused to drive from Glendale to Mesa to see Child if CPS would not reimburse him for travel expenses. After Father pled guilty to the credit card theft charge in February 2012, he requested a visit with Child before his sentencing date. He was placed on a waiting list and then did not show up for a scheduled visit. Father was sentenced on April 3, 2012 to two years' incarceration. The court subsequently changed the case plan to severance and adoption, and ADES moved to sever Father's parental rights.

¶5 The court held a contested severance hearing on September 7 and 26, 2012. Father's former case manager testified that he was concerned Father would not be able to provide Child with a stable life considering Father was incarcerated for his eighth felony conviction. Additionally, the case manager testified that Father had not sent any letters to Child or requested a visit with Child while he was

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<sup>2</sup> Father appealed the court's dependency determination. This court affirmed the determination and the termination of the in-home dependency case plan. *Edward B. v. Ariz. Dep't of Econ. Sec.*, 1 CA-JV 11-0235, 2012 WL 1207388, at \*3, ¶¶ 12, 14 (Ariz. App. Apr. 10, 2012) (mem. decision).

incarcerated, and Child should not have to wait until Father is released and completes the services CPS requires to determine whether Father can parent Child.

¶16 The superior court granted ADES's motion to sever Father's rights on grounds of abandonment and length of sentence pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) and (4) (West 2013), and found that severance was in Child's best interests.<sup>3</sup> Father's timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (West 2013), 12-120.21(A)(1) (West 2013) and -2101(A)(1) (West 2013).

#### DISCUSSION

##### A. Legal Principles.

¶17 To justify termination of the parent-child relationship, the superior court must find, by clear and convincing evidence, at least one of the statutory grounds enumerated in A.R.S. § 8-533(B). *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). The juvenile court must also find by a preponderance of the evidence that termination is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

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<sup>3</sup> Absent material revisions after the relevant date, we cite a statute's current version.

¶18 On appeal, we view the evidence in the light most favorable to affirming the superior court's findings, *Michael J.*, 196 Ariz. at 250, ¶ 20, 995 P.2d at 686, and we will affirm a severance order unless it is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). Because the superior court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings," we will accept its findings of fact unless no reasonable evidence supports them. *Id.*

**B. Length of Sentence.**

¶19 Father argues the superior court erred in severing his parental rights based on the length of his sentence pursuant to § 8-533(B)(4). That statute provides, in pertinent part, that the court may terminate the parent-child relationship if "the parent is deprived of civil liberties due to the conviction of a felony . . . 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." A.R.S. § 8-533(B)(4).

¶10 There is no bright-line rule for when the length of a sentence warrants termination of parental rights. *Michael J.*, 196 Ariz. at 251, ¶ 29, 995 P.2d at 687. In *Michael J.*, the Arizona Supreme Court set forth a non-exhaustive list of

relevant factors a court should consider in making that determination:

(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.* at 251-52, ¶ 29, 995 P.2d at 687-88. Here, reasonable evidence supports the court's ruling that under the *Michael J.* factors, Father's prison sentence would deprive Child of a normal home for a period of years.

¶11 When Father was sentenced, Child was ten months old and had lived with Father for a short time when he was only two months old. Additionally, Child was fifteen months old at the time of the severance hearing and had not seen Father since he was five months old. Though the case manager acknowledged that he supervised "very positive visits" while Child was in Father's care, he testified that Father will be a stranger to Child when he is released.

¶12 Father contends the court erred in severing his rights because Child formed a relationship with him that could continue

and be nurtured during his incarceration but for CPS's failure to provide visits. But the case manager testified he was not aware that Father requested any visitation while incarcerated. The case manager also opined that given Child's young age, he could not be taken to visit Father in prison, and such a setting would not facilitate the formation of a bond between Father and Child. Furthermore, while Father testified he sent Child a postcard every week, his file contained a record of only one postcard sent to Child in December 2011 and a letter sent to the case manager in February 2012, both before Father was sentenced.

¶13 Father also argues the court should have considered his early release date of October 2013. We find no error, however, in the court's consideration of Father's actual length of sentence of two years, independent of whether earlier release might be possible. See *Jesus M.*, 203 Ariz. at 280, ¶ 6, n.1, 53 P.3d at 205. By the date of Father's actual release in April 2014, he will have been incarcerated for more than half of Child's life. Additionally, the case manager testified that whenever Father is released, he must complete several services, including anger management counseling. Reasonable evidence therefore supports the court's finding that "[t]his would prolong a permanent placement/plan for [Child] even longer as Father would not be considered a fit and capable parent upon his release."

¶14 In sum, reasonable evidence supports the court's finding that Father's sentence is of such a length to deprive Child of a normal home for a period of years.<sup>4</sup>

**C. Best Interests.**

¶15 Father asserts the superior court erred in finding that severance would be in Child's best interests. See A.R.S. § 8-533(B). To support a finding that termination is in the child's best interests, ADES must prove that the child will affirmatively benefit from the termination. *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990). This means that "a determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Id.* at 5, 804 P.2d at 734.

¶16 Our review of the record reveals that the superior court's determination is supported by a preponderance of the evidence. The case manager testified that because Father is incarcerated, he will not be present for Child's early years when he bonds with his caretaker and develops his identity. Moreover, the case manager expressed concern that because Father was incarcerated for his eighth felony conviction, "he places

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<sup>4</sup> In light of this conclusion, we need not examine whether the court erred by concluding that termination also was appropriate on grounds of abandonment. See A.R.S. § 8-533(B) (termination warranted if any of listed circumstances exists).



[Child] at risk of not being able to parent at all times if he recommits another crime." Father's ability to obtain stable employment and housing could be compromised by his criminal history. The court found Child "would benefit from a safe, stable, permanent home free of . . . criminal activity."

¶17 The court also may consider evidence that an existing placement is meeting the needs of the child in determining that severance is in the child's best interests. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998). Here, the case manager testified that Child is doing "very well" with his relative caregivers, and he is "very bonded and attached" to them. He also stated that Child is "very adoptable" and his caregivers are "willing and able" to adopt him. See *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998) (evidence of existing adoption plan can be considered a benefit to the child in best interests determination); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004) (best interest requirement may be met if the petitioner proves that the child is adoptable).

¶18 Thus, we conclude sufficient evidence supports the court's finding that termination of Father's parental rights is in Child's best interests.

**CONCLUSION**

¶19 For the foregoing reasons, we affirm the severance of Father's parental rights to Child.<sup>5</sup>

/S/

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ROBERT C. HOUSER, Judge Pro Tempore\*

CONCURRING:

/S/

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PATRICIA A. OROZCO, Presiding Judge

/S/

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PETER B. SWANN, Judge

\*The Honorable Robert C. Houser, Judge (Retired) of the Maricopa County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).

<sup>5</sup> The caption has been amended to safeguard the identity of the juvenile pursuant to Administrative Order 2013-0001.