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



DIVISION ONE  
FILED: 6/25/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

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

DOUGLAS T., ) 1 CA-JV 12-0278  
)  
Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz.R.P.Juv.Ct.  
SECURITY, A.D.,<sup>1</sup> ) 103(G); ARCAP 28)  
Appellees. )  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause Nos. JD11174; JS11958

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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John L. Popilek P.C.  
By John L. Popilek  
Attorney for Appellant

Scottsdale

Thomas C. Horne, Attorney General  
By Carol A. Salvati, Assistant Attorney General  
Attorneys for Appellees

Phoenix

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**H O W E**, Judge

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<sup>1</sup> The caption has been amended to safeguard the juvenile's identity pursuant to Administrative Order 2013-0001.

¶1 Douglas T. ("Father") appeals termination of his parental rights to his biological child A.D. ("Child"). For the following reasons, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 Child was born in January 2012 while Father was serving a two-and-one-half-year prison sentence for possession of dangerous drugs. At Child's birth, both Child and her mother ("Mother") tested positive for amphetamine. Consequently, Child Protective Services ("CPS"), a division of the Arizona Department of Economic Security ("ADES"), removed Child from Mother's care and took temporary physical custody. CPS provided Father with a paternity test, which confirmed he was Child's father. ADES then filed a dependency petition alleging that Child was dependent because of neglect by Mother due to her substance abuse and by Father due to his incarceration. The juvenile court found the child dependent to both parents.

¶3 On February 6, 2012, ADES filed a petition to terminate Mother's and Father's parental rights. Mother did not contest the petition, and the court severed her parental rights. In its petition regarding Father, ADES argued the court should sever Father's parental rights under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(4) (West 2013),<sup>2</sup> which provides for

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<sup>2</sup> We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

severance of a parent-child relationship when "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." ADES also argued that severing Father's parental rights was in the child's best interests.

¶4 The juvenile court heard ADES's petition on November 9, 2012. At the time of the hearing, Father was in prison. His earliest projected release date was in September of 2013, and his latest projected release date was in January of 2014. Father admitted that he had never seen Child, who was then ten months old; had never supported her financially, although he had supported his other children; had never given her any gifts; and had never done anything to establish a parental relationship with her. Moreover, Father had never contacted CPS to request visits with Child or even to ask about her welfare.

¶5 The CPS case manager testified that Child had been placed in the same foster home with her three half-siblings on Mother's side since she was three days old. She testified that Child was adoptable, her placement was willing to adopt her, and she had developed a bond to her placement and her three half-siblings. In fact, "[t]he siblings enjoy having their little sister around[, and] [t]hey will check on her when she starts to cry to ensure that she is okay." The case manager testified that

severing Father's parental rights was in Child's best interests because it would afford her with "permanenc[e] and a normal life." Although ADES had investigated Child's paternal grandmother as a possible placement, she was not available at the beginning of the case. Moreover, the case manager was concerned about the grandmother's difficulty in maintaining contact with CPS because she kept calling the previous case manager.

¶6 Father attempted to cross-examine the case manager about the possibility of placing Child with the paternal grandmother. The State objected to the question because it dealt with a placement issue, not a severance issue. Father asserted the question went to Child's best interests. The court sustained the objection. After the State rested, Father called the paternal grandmother as a witness. The court allowed the paternal grandmother to testify but reminded Father that it would not allow any testimony about potential placement for Child.

¶7 The juvenile court severed Father's parental rights. The court found that ADES had proven, by clear and convincing evidence, the statutory grounds under A.R.S. § 8-533(B)(4) and, by a preponderance of the evidence, that severance of Father's parental rights was in Child's best interests. In finding ADES had proven the statutory grounds, the court found that Father

did not have a parental relationship with Child before incarceration; that establishing a bond during his incarceration would be difficult because of Child's age; that Father had been incarcerated since August 31, 2011, and his latest projected release date was January 23, 2014; and that no other parent was available to provide a normal home life for Child.

¶8 Father timely appeals. This Court has jurisdiction under A.R.S. §§ 8-235 and 12-120.21(A)(1).

#### **DISCUSSION**

¶9 Father argues that the juvenile court erred in finding that his incarceration justified severance of his parental rights, in precluding testimony from the paternal grandparent, and in concluding the State had provided adequate services to Father. We find no error and affirm.

##### **I. Father's Conviction**

¶10 We view the evidence and all reasonable inferences therefrom in the light most favorable to upholding the juvenile court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We do not reweigh the evidence because the juvenile court, as the trier of fact, "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, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004). We accept

the juvenile court's factual findings if reasonable evidence supports them, and we 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).

¶11 To terminate parental rights, the juvenile court must find by clear and convincing evidence that a ground for termination set forth in A.R.S. § 8-533 exists, and by a preponderance of the evidence that termination is in the child's best interest. *Kent K. v. Bobby M.*, 210 Ariz. 279, 280, 288, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). Severance under A.R.S. § 8-533(B)(4) is justified where 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). To determine the length of incarceration that justifies severance, our supreme court has set out the following six factors to consider:

- (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.

*Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251-52, ¶ 29, 995 P.2d 682, 687-88 (2000).

¶12 Reasonable evidence supported the juvenile court's finding that the sentence was of such length that Child would be deprived of a normal home for a period of years. Father had no parental relationship with Child before incarceration, and because of her age, establishing this relationship while Father is in prison would be difficult. Furthermore, Father did not take any steps towards building this relationship. He made no effort to contact Child's case manager to inquire about her well-being. Additionally, while he provided financial support for his other children, he provided no support for Child. Father has been incarcerated since August 21, 2011, and his latest release date is January 23, 2014. Until that time, no other parent is available to provide Child a normal home life.

¶13 Father argues that the juvenile court erred in concluding that Child's birth during his incarceration alone justified severing his parental rights. Father also argues the court should have put more weight on the relatively short length

of his sentence.<sup>3</sup> As stated above, the court did not base its decision solely on Father's incarceration when Child was born. The court also considered the length of sentence, the lack of an available parent, and Father's current relationship with Child. Additionally, we reject Father's suggestion that the sentence length is dispositive of the question. In *Michael J.*, our supreme court rejected establishing a "bright line" definition of when a sentence is sufficiently long enough under the statute. *Michael J.*, 196 Ariz. at 251, ¶ 29, 53 P.3d at 687. Instead of focusing on the length of the sentence, the court should focus on the particular facts of each case. *Id.* ("In some instances, a 20-year sentence might not provide sufficient basis for severing an incarcerated parent's rights, while in another case a 3-year sentence could provide the needed basis.") Therefore, because reasonable evidence supports the court's ruling, the court did not err in terminating Father's parental rights under A.R.S. § 8-533(B)(4).

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<sup>3</sup> The parties dispute which release date the court should have considered (September 2013 or January 2014). The court properly relied on the latest possible release date. "[T]he court must consider the entire length of sentence and not whether the parent may be parole eligible within that time." *James S. v. Arizona Dep't of Econ. Sec.*, 193 Ariz. 351, 354, n.3, ¶ 12, 972 P.2d 684, 687, n.3 (App. 1998).



## II. Paternal Grandparent's Testimony

¶14 Father argues that the court erred in precluding the paternal grandparent's testimony about possible placement at her home. This court reviews a trial court's ruling on the exclusion of evidence for an abuse of discretion and will reverse only if it finds legal error and resulting prejudice. *Taeger v. Catholic Family & Comty. Servs.*, 196 Ariz. 285, 295-96, ¶ 35, 995 P.2d 721, 731-32 (App. 1999).

¶15 Father argues first that the testimony was relevant to the "availability of another parent to provide a normal home life." Father's argument fails because the question under this factor is whether another *parent* is available to provide the child with a normal home. The statute's reference to a "normal home" relates to the *parents'* obligation to provide a normal home and not one that others create in the parent's absence. See *In re Maricopa County Juv. Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986). Because the court had already severed mother's parental rights, no other parent could provide Child with a normal home during Father's incarceration.

¶16 Father argues second that the testimony was relevant to Child's best interests.<sup>4</sup> However, the juvenile court's consideration of a child's best interests in severance is separate from its determination of placement after severance. *Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, 370-71, ¶ 2, 214 P.3d 1010, 1011-12 (App. 2009) ("[T]he court does not 'weigh alternative placement possibilities to determine' if severance is in the child's best interests."). Therefore, the juvenile court did not err in precluding the paternal grandmother's testimony on her possible placement for Child.

### III. Adequate Services

¶17 Father argues that ADES failed to provide him adequate services to allow him to develop a relationship with Child. Unlike other subsections of A.R.S. § 8-533, "subsection (B)(4) imposes no explicit duty on [ADES] to provide reunification services." *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶ 6, 106 P.3d 327, 328 (App. 2005) ("[T]he legislature in

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<sup>4</sup> Father argues Child's best interests in relation to the relevance of the grandmother's testimony. To the extent that Father argues the court erred in finding that severance was in Child's best interest, we disagree. The court found severance was in Child's best interest given Child's bond to her current placement, her bond to her three half-siblings at that placement, and her lack of parental relationship with Father. Moreover, the case manager testified that Child was adoptable and her placement was willing to adopt her. Accordingly, we find that reasonable evidence supported the court's finding that severance was in Child's best interests.

1998 amended the introductory language of A.R.S. § 8-533(B) to delete therefrom the requirement that the court consider 'the availability of reunification services to the parent and the participation of the parent in these services' for all grounds for severance."). *Id.* Furthermore, while ADES may have a constitutional duty to engage in reunification efforts, this duty does not apply when reunification efforts would be futile. *Id.* at ¶ 8. In the case of a lengthy prison sentence, the physical separation between the parent and the child makes such efforts futile. *Id.* at 2-3, ¶ 9, 106 P.3d. at 328-29 ("[N]othing [ADES] has to offer in the way of services can affect that reality."). The case manager testified that because of Child's age, developing a bond during Father's incarceration would be difficult. Furthermore, Father's failure to ask for visitation, failure to provide support, and failure to demonstrate interest in Child's well-being allowed the court to find these efforts would be futile. Thus, ADES had no obligation to provide Father additional services.

**CONCLUSION**

¶18 For these reasons, we affirm the juvenile court's termination order.

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

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge