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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

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

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ZETH S., *Appellant*,

*v.*

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, N.S., *Appellees*.

No. 1 CA-JV 13-0136  
FILED 11-26-2013

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Appeal from the Superior Court in Maricopa County  
No. JD21873  
The Honorable Jay R. Adleman, *Judge Pro Tempore*

**AFFIRMED**

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COUNSEL

Denise L. Carroll, Scottsdale

*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Robert I. Brooks

*Counsel for Defendant/Appellee*

**MEMORANDUM DECISION**

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Patricia A. Orozco joined.

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**T H U M M A**, Judge:

¶1 Zeth S. (Father) appeals from the superior court's order terminating his parental rights to N.S.<sup>1</sup> Finding no error, the order is affirmed.

**FACTS<sup>2</sup> AND PROCEDURAL HISTORY**

¶2 Zeth is the biological father of N.S., who was born in July 2009 while Mother was in prison. Three days after his birth, N.S. was placed with his maternal great-grandmother. In December 2009, Father consented to a temporary guardianship for N.S. in favor of the great-grandmother.

¶3 During the guardianship, Father did not provide any financial support for N.S. Father visited N.S. about once a week, but no evidence was presented that Father fed, bathed, changed diapers or in any way cared for N.S. in a manner customary for a parent of a newborn. During the guardianship, Father's parental rights to another child were terminated based on abandonment.

¶4 On January 12, 2011, Father was placed on probation for three years for convictions of possession of drug paraphernalia and solicitation to commit misconduct involving weapons committed on

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<sup>1</sup> The caption has been amended to safeguard the identity of N.S. pursuant to Administrative Order 2013-0001. Although the superior court also terminated Mother's rights to N.S., Mother is not a party to this appeal.

<sup>2</sup> On appeal from an order terminating parental rights, this court views the evidence in the light most favorable to sustaining the superior court's findings. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

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December 15, 2010. Just twelve days later, Father was arrested for burglary. He subsequently pled guilty to burglary in the second degree and on February 28, 2011, was sentenced to prison for two and one-half years. At that time, Father had not seen N.S. for several months.

¶5 Father was in custody continuously from late January 2011 until his release from prison on January 2, 2013. While in custody, Father had no visitation or telephonic contact with N.S. Although disputed at trial, Father claimed to have sent approximately 30 cards or letters to his family and N.S. while in custody. Father also sent N.S. two presents he built during his time in prison. Father testified that he did not believe that he could have done anything more to be a part of N.S.'s life while incarcerated. Father agreed, however, that he did not have a normal parental relationship with N.S. while he was in prison.

¶6 N.S. was found dependent as to both parents in early August 2012. On August 27, 2012, the Arizona Department of Economic Security (ADES) moved to terminate Father's parental rights to N.S. claiming abandonment and termination of parental rights to another child within the preceding two years for the same cause. *See Arizona Revised Statutes (A.R.S.) sections 8-533(B)(1), (B)(10) (2013).*<sup>3</sup>

¶7 At Father's request, the severance trial was continued several times. Following his release from prison, Father was offered various services, including reunification services, urinalysis testing, a substance-abuse assessment and treatment, parent-aid services and a psychological evaluation. Although Father refused to participate in a psychological evaluation, Father consistently passed all of his drug tests and participated in substance-abuse treatment. Father also participated in supervised visits with N.S., first twice a week and then three times a week shortly before the severance trial.

¶8 At the May 2013 severance trial, Father testified that he was employed, working two jobs and hoped to get his Commercial Driver's License. At that time, Father was living with N.S.'s paternal grandfather, and described his living situation as stable. Although Father testified that he could provide a home, food, clothes and a school for N.S., he had not yet done so and, in fact, had never done so. Father added he was not "sure

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<sup>3</sup> Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

exactly who provides those things for” N.S., but was “sure that he’s taken care of.”

¶9 After hearing testimony and considering the other evidence and argument provided, the superior court granted the motion to terminate. The court found by “clear and convincing evidence that [Father] has failed to maintain a normal parental relationship throughout [N.S.’s] entire life;” Father “had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause” and termination was in the best interests of N.S.

¶10 From that order, Father timely appeals. This court has jurisdiction pursuant to the Arizona Constitution Article 6, Section 9 and A.R.S. § 8-235.

## DISCUSSION

### I. Standard Of Review.

¶11 As applicable here, the superior court could properly grant the motion to terminate upon a showing by (1) clear and convincing evidence of at least one statutory ground for severance and (2) a preponderance of the evidence that severance is in the best interest of the child. *See* 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); *Marina P. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 326, 329, ¶ 18, 152 P.3d 1209, 1212 (App. 2007). This court reviews a severance ruling for an abuse of discretion, accepting factual findings unless clearly erroneous. *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004).

### II. The Superior Court Properly Granted The Motion To Terminate Based On Abandonment.

¶12 Father argues the superior court erred in terminating his parental rights because ADES failed to prove abandonment by clear and convincing evidence. By statute,

“Abandonment” means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and

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communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1). Although “incarceration affects the court’s consideration of whether” a parent abandons a child, incarceration alone “does not justify a failure to make more than minimal efforts to support and communicate with” a child. *Michael J.*, 196 Ariz. at 250, ¶ 21, 995 P.2d at 686. Indeed, a parent must make “more than minimal efforts to support and communicate with [the] child” and “must act persistently to establish the [parent-child] relationship however possible and must vigorously assert legal rights to the extent necessary.” *Id.* at 250, ¶ 21-22, 995 P.2d at 686 (quoting *In re Pima Cnty. Juvenile Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994) (emphasis removed)). Abandonment is determined “by conduct, not by subjective intent.” *In re Pima Cnty. Juvenile Action No. S-114487*, 179 Ariz. at 97, 876 P.3d at 1132.

¶13 The superior court found that Father had “failed to maintain a ‘normal parental relationship’ throughout the child’s entire life” and that Father “ha[d] made virtually no effort to support the child at any point in the child’s lifetime.” Father argues that the trial evidence shows that he vigorously asserted his legal rights to N.S., regularly visited N.S. after his release from prison and sent letters and gifts to N.S. during his incarceration. Accordingly, Father argues, the trial evidence showed that he never intended to abandon N.S. and the court’s finding to the contrary is error.

¶14 The law is clear that “abandonment is measured not by a parent’s subjective intent,” *Michael J.*, 196 Ariz. at 249, 995 P.2d at 685, and that severance is justified when the parent has failed to maintain a normal parental relationship, A.R.S. § 8-531(1). It is true that, while incarcerated, Father testified he sent, on average, a card or two to N.S. each month and made two gifts for N.S. It is similarly true, as Father contends, that the superior court properly could consider whether he had sent cards, gifts or letters to N.S. See *Michael J.*, 196 Ariz. at 251, 995 P.2d at 687. After his release, Father also participated in many services, including visitation.

¶15 On the other hand, Father admitted he never had a normal parental relationship with N.S. at any time. Father has never had physical custody of N.S. Moreover, the evidence at trial indicated Father never provided N.S. any financial support, clothes or food. Father testified that,

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although he was employed, his bills outpaced his earnings and he relied on his family for housing and other financial support. As noted above, when asked about support for N.S., Father testified he was not “sure exactly who provides those things for” N.S., but was “sure that he’s taken care of.”

¶16 This court does not reweigh evidence considered by the superior court. See *Yvonne L. v. Ariz. Dep’t of Econ. Sec.*, 227 Ariz. 415, 422, ¶ 27, 258 P.3d 233, 240 (App. 2011). Given the conflicting evidence received at the severance trial, this court cannot say that the superior court abused its discretion in finding that Father abandoned N.S. *Mary Lou C.*, 207 Ariz. at 47, 83 P.3d at 47.<sup>4</sup>

**III. The Superior Court Did Not Abuse Its Discretion In Finding Termination Was In N.S.’s Best Interests.**

¶17 In addressing best interests, the superior court “must find either that the child will benefit from termination of the relationship or that the child would be harmed by continuation of the relationship.” *James S. v. Ariz. Dep’t of Econ. Sec.*, 193 Ariz. 351, 356, ¶ 18, 972 P.2d 684, 689 (App. 1998) (citing cases). Factors the court may properly consider include “the immediate availability of an adoptive placement” and “whether an existing placement is meeting the needs of the child.” *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998).

¶18 The superior court found that termination of Father’s parental rights would benefit N.S. because the child is in a stable, potentially-adoptive familial placement. Father acknowledged the stability of the placement and that N.S. needed to remain in the current placement for some additional time. Given this evidence, Father has not shown that the superior court abused its discretion in finding that severance was in N.S.’s best interests.

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<sup>4</sup> Having found the superior court did not err in granting the motion to terminate based on abandonment, the court need not and expressly does not address the prior termination ground ADES alleged. See *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3, 53 P.3d 203, 205 (App. 2002) (noting if one ground for severance is properly shown, this court “need not address claims pertaining to the other grounds”).

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**CONCLUSION**

¶19 The superior court's order terminating Father's parental relationship with N.S. is affirmed.



Ruth A. Willingham - Clerk of the Court  
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