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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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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GABINO S., *Appellant*,

*v.*

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

No. 1 CA-JV 17-0204  
FILED 1-23-2018

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Appeal from the Superior Court in Maricopa County  
No. JD31934  
The Honorable Alison Bachus, Judge

**AFFIRMED**

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COUNSEL

David W. Bell, Attorney at Law, Higley  
By David W. Bell  
*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Amber E. Pershon  
*Counsel for Appellee Department of Child Safety*

## MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Thomas C. Kleinschmidt<sup>1</sup> joined.

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**S W A N N**, Judge:

**¶1** Gabino S. (“Father”) appeals an order terminating his parental rights on the statutory ground of abandonment under A.R.S. § 8-533(B)(1). We hold that the state has provided the necessary clear and convincing evidence to support termination, and sufficient evidence to demonstrate that severance is in the children’s best interests. We therefore affirm.

### FACTS AND PROCEDURAL HISTORY

**¶2** Father and Renee R. (“Mother”)<sup>2</sup> are the natural parents of A.S., born in 2012, N.S., born in 2013, and G.S., born in 2016 (collectively, “Children”).<sup>3</sup> In January 2016, the Department of Child Safety (“DCS”) took the Children into temporary custody after Mother tested positive for THC, opiates, and amphetamines when she delivered G.S. DCS subsequently filed an out of home dependency petition alleging Father had neglected the Children and was unable or unwilling to provide them with proper and effective parental care and control.

**¶3** Father has a history of felony convictions and imprisonment. Father’s first conviction and imprisonment was for assault against Mother. After his release, he was arrested for violating his probation by possessing a weapon. Father was placed on work furlough, and required to complete substance-abuse testing and domestic-violence classes. Father completed one drug test that came back diluted and he did not attend domestic-

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<sup>1</sup> The Honorable Thomas C. Kleinschmidt, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

<sup>2</sup> The juvenile court also terminated Mother’s parental rights and she is not a party to this appeal.

<sup>3</sup> Father has three other children who are not parties to this appeal.

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violence classes. Instead, Father went “on the run” for seven months. Because of Father’s imprisonment, he has only been present for three out of five years of A.S.’s life, two out of four years of N.S.’s life, and for three months of G.S.’s life.

¶4 Before turning himself in and while Children were in grandmother’s care, Father testified that his sole contact with Children was when he attended a birthday party in February 2016. After turning himself in, Father was convicted of escape, sentenced to 1.5 years in prison and was projected to be released in July 2017, with a maximum end date of October 7, 2017.

¶5 While in prison, Father refused to allow Children to visit because he did not want them to see him incarcerated. The only contact Father made with Children while in prison was sending them five cards between August and October 2016. Father testified that he did not send more cards because he did not have the funds to do so.

¶6 During his testimony, it became evident that Father did not know basic facts about Children, such as the names of their schools, their favorite foods, and that the youngest child had gone through drug withdrawals because of Mother’s drug abuse during pregnancy. Father also admitted that he did not have a “normal parent-child relationship” with his children because he was incarcerated.

¶7 During the severance hearing, Natalie Fondell, a social worker with DCS and the ongoing case manager for the case, testified that DCS sent a service letter to Father, requesting that he participate in services allowed and encouraging him to send letters and to call the case manager with questions. Though he received the letter, Father did not contact DCS, send any support or gifts to DCS for Children, or make phone calls to Children.

¶8 Since Father’s incarceration, Children have been placed in the care of their grandmother. The case manager testified that the placement is the “least restrictive given the children’s needs.” Upon severance, Children will be eligible to be adopted by their grandmother, giving them a permanent home. Fondell also testified that severance is in the best interests of Children because of the repetitive nature of Father’s incarceration and the instability it causes.

¶9 On April 20, 2017, the superior court found that DCS had proven the ground alleged for severance and that it was in Children’s best

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interests. As a result, Father's parental rights were terminated and he now appeals.

## DISCUSSION

**¶10** The termination of a parent-child relationship under Arizona statutes requires the court to make two findings. *Kent K. v. Bobby M.*, 210 Ariz. 279, 280, ¶ 1 (2005). First, the court must determine that one statutory ground under A.R.S. § 8-533(B) has been proven by clear and convincing evidence. *Id.* Second, the court must find that it is in the child's best interests to terminate the parent-child relationship by a preponderance of the evidence. *Id.* at 284, ¶ 22. We accept the court's findings of fact unless they are not supported by any reasonable evidence, and we will affirm the severance order unless it is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

**¶11** Father contends that the court abused its discretion in finding that DCS had proven the ground of abandonment. We conclude that sufficient evidence supports the termination order.

**I. REASONABLE EVIDENCE SUPPORTS THE COURT'S FINDING THAT SEVERENCE OF FATHER'S PARENTAL RIGHTS WAS ACCEPTABLE UNDER A.R.S. § 8-533(B)(1).**

**¶12** For purposes of A.R.S. § 8-533(B)(1), abandonment is defined as:

[T]he 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 communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months shall constitute *prima facie* evidence of abandonment.

A.R.S. § 8-531(1). To evaluate a claim of abandonment, we look to factors such as whether a parent provided reasonable support, has maintained regular contact, and has made more than a minimal effort to support and communicate with the child. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 18 (2000).

**¶13** On its own, imprisonment neither justifies nor precludes severance based upon abandonment. *In re Pima Cty. Juv. Action No. S-624*,

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126 Ariz. 488, 490 (App. 1980). Rather, we have consistently held that it is the duty of a parent to assert vigorously his or her rights at every opportunity, thereby strengthening the emotional bonds with the child. *Kenneth B. v. Tina B.*, 226 Ariz. 33, 37, ¶ 21 (App. 2010); *Michael J.*, 196 Ariz. at 251, ¶ 25. Essentially, a parent must “do something, because conduct speaks louder than words or subjective intent.” *In re Pima Cty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97 (1994).

**¶14** The evidence in the present case amply supports the court’s finding that Father abandoned Children. At best, Father has had sporadic contact with Children. Father admits that his relationship with Children cannot be characterized as a normal parent-child relationship. His repeated incarceration for multiple felonies has prevented him from being present for more than six months of Children’s lives.

**¶15** While Father was encouraged and had the opportunity to assert his parental rights while serving his sentences, he continuously failed to do so. Father did not allow Children to visit him in prison and he did not call or contact the DCS case manager with inquiries into Children’s health, schooling, or well-being. Father’s failure during testimony to provide any insight into Children’s favorite foods, schooling, and even the drug withdrawals experienced by the youngest child suggest an absence of a substantial bond.

**¶16** And though Father testified that he did not have funds to send Children more cards while incarcerated, the record shows that Father could have called Children or DCS to inquire about their well-being. We conclude that the juvenile court properly ruled that severance was warranted under A.R.S. § 8-533(B)(1).

II. REASONABLE EVIDENCE SUPPORTS THE COURT’S FINDING THAT SEVERANCE OF FATHER’S PARENTAL RIGHTS WAS IN CHILDREN’S BEST INTERESTS.

**¶17** A finding that severance is in a child’s best interests requires the court to determine that severance affirmatively benefits the child or that continuing the relationship poses a detriment to the child. *Dominique M. v. Dep’t of Child Safety*, 240 Ariz. 96, 98, ¶ 8 (App. 2016). One relevant, but not dispositive, factor that the court may properly consider in favor of severance is whether there is immediate availability of an adoptive placement. *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5 (App. 1998). Other relevant factors include whether the existing placement meets

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the needs of the children, and the adoptability of the children. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379, ¶ 30 (App. 2010).

**¶18** Reasonable evidence in the record suggests that severance is in Children's best interests. DCS presented evidence that maintaining the parent-child relationship with Father is harmful to Children, and that Father's inability to remain consistently in Children's lives creates a confusing struggle for them. The record shows that Children currently reside with their grandmother, who has shown an interest in adopting them. Further, Children are thriving in their grandmother's care.

### CONCLUSION

**¶19** For the foregoing reasons, we affirm.



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