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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

*v.*

DEPARTMENT OF CHILD SAFETY, N.K., *Appellees*.

No. 1 CA-JV 17-0553  
FILED 6-19-2018

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Appeal from the Superior Court in Maricopa County  
No. JD24224  
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 Carol A. Salvati  
*Counsel for Appellee*

**MEMORANDUM DECISION**

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Peter B. Swann joined.

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**H O W E**, Judge:

¶1 Eric K. (“Father”) appeals the juvenile court’s order terminating his parental rights to his child, N.K., on the ground of time in an out-of-home placement for 15 months under A.R.S. § 8-533(B)(8)(c). For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Robin M. (“Mother”)<sup>1</sup> gave birth to N.K. in April 2005. N.K. was diagnosed with cerebral palsy, a seizure disorder, and an intellectual disability. As a result, he functioned at a one-year-old’s level, was nonverbal except to say “mama,” primarily moved by crawling on the floor, received nourishment formula through a gastronomy tube, required his diapers to be changed every two hours, and slept in an adult-sized crib.

¶3 In August 2013, the Department of Child Safety removed N.K. and his two brothers from their parents’ custody due to neglect. Later that month, the Department petitioned for all three children’s dependency and alleged that Father was neglecting the children by abusing substances, committing domestic violence in the children’s presence, lacking stable housing and necessities of life, failing to send the children to school for at least one year, and allowing N.K.’s Department of Economic Security’s Division of Developmental Disabilities (“DDD”) services to lapse. The court later found that the children were dependent with respect to Father.

¶4 The Department provided Father with urinalysis testing, substance-abuse treatment, parent-aide services, a psychological evaluation, domestic-violence counseling, anger-management counseling, parenting classes, a housing subsidy, and visitation. Based on Father’s participation in services, the court dismissed the dependency action with

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<sup>1</sup> The juvenile court terminated Mother’s parental rights to N.K., and she is not a party to this appeal.

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respect to N.K.'s two older siblings and they returned to Father's care in July 2015. N.K., however, remained dependent.

¶5 In January 2016, the Department allowed Father to have unsupervised visits with N.K. in anticipation that N.K. would return to Father's care. During these visits, Father was responsible for giving N.K. his seizure medication and his formula. The Department informed Father in August that he needed to fulfill two conditions to have N.K. returned to his care: (1) enroll N.K. in his local school district and (2) transfer N.K.'s DDD services to his home to eliminate any gap in services when N.K. transitioned to Father's care. The Department also asked Father to enroll N.K. in an afterschool program through DDD services, which was optional rather than required. In January 2017, the Department learned that Father did not administer any medication to N.K. one weekend because N.K. returned to his placement with all of the medication remaining. In a separate incident, Father did not receive N.K.'s formula from the transport vehicle, and he waited 20 hours before calling N.K.'s placement to replace the formula. Thereafter, the Department ended Father's unsupervised visits.

¶6 By February, Father still had not enrolled N.K. in a local school district or transferred N.K.'s DDD services to his home, and the Department moved to change the case plan to severance and adoption. The court granted the motion, and later that month the Department moved to terminate Father's parental rights to N.K. under the 15 months in an out-of-home placement ground. The Department also alleged that terminating Father's parental rights was in N.K.'s best interests.

¶7 The termination hearing was held in October, and Father had not yet enrolled N.K. in his local school district or transferred N.K.'s DDD services to his home. By then, N.K. had been in a court-ordered out-of-home placement for over four years. At the hearing, Father's case manager testified that Father would not be able to effectively parent N.K. in the near future and that she was concerned N.K. would not receive the services he needed if he returned to Father's care. She noted that Father had over a year to set up the two required services, yet had failed to do so. The case manager admitted, however, that Father could not perform the optional request of enrolling N.K. in an afterschool program until he had physical custody of N.K. She opined that if N.K. was placed in Father's care, N.K. would likely lose his DDD services, would not receive his medication, and would not be enrolled in a school district. She further opined that these actions would severely risk N.K.'s health. The case manager also testified that N.K. was adoptable even though an adoptive home had not been identified. She

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further testified that by terminating Father's parental rights N.K. would be transferred to the Department's permanency planning unit, which had better resources to find an adoptive home and would increase N.K.'s chances for adoption. She also stated that leaving Father's parental rights in place would be detrimental to N.K. because N.K. would remain "in a case plan limbo" and be unable to move towards permanency and stability.

¶8 Subsequently, the court terminated Father's parental rights to N.K. under the 15 months in an out-of-home placement ground. The court specifically found that (1) N.K. had been in an out-of-home placement for 15 months or longer, (2) the Department had made diligent efforts to provide reunification services, (3) Father had not remedied the circumstances that caused the out-of-home placement, and (4) a substantial likelihood existed that Father would not be capable of exercising proper and effective care and control in the near future. The court also found that terminating Father's parental rights was in N.K.'s best interests because he was adoptable and would be free for adoption by a placement that would prioritize his needs. The court further found that termination would ensure that N.K. received DDD services and enrollment in a school, which Father had not done to that point. Additionally, the court found that N.K. would suffer a detriment if Father's parental rights were not terminated because N.K. would be "left to linger in foster care, waiting for Father to do what is needed to reunify with him." The court also noted that N.K. would be at risk for medical neglect because Father had not reliably provided him with medication and formula. Father timely appealed.

## DISCUSSION

¶9 Father argues that the court erred by terminating his parental rights because the Department did not show that Father was incapable of exercising proper parental care and control of N.K. in the near future. Father also argues that the evidence did not support the best interests finding. Because sufficient evidence showed that Father was incapable of exercising proper parental care and control in the near future and that terminating Father's parental rights was in N.K.'s best interests, the court did not abuse its discretion.

¶10 A juvenile court's termination order is reviewed for an abuse of discretion. *E.R. v. Dep't of Child Safety*, 237 Ariz. 56, 58 ¶ 9 (App. 2015). "The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280 ¶ 4 (App. 2002). This Court will accept

the juvenile court's factual findings unless no reasonable evidence supports them and will affirm a termination order unless it is clearly erroneous. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 508 ¶ 1 (App. 2008).

¶11 To terminate parental rights, the juvenile court must find by clear and convincing evidence that at least one of the statutory grounds for termination exists and by a preponderance of the evidence that termination is in the child's best interests. *Jennifer S. v. Dep't of Child Safety*, 240 Ariz. 282, 286 ¶ 15 (App. 2016). As pertinent here, the juvenile court may terminate parental rights when (1) the Department made a diligent effort to provide appropriate reunification services, (2) the child has been in an out-of-home placement for a cumulative total period of 15 months or longer pursuant to court order, (3) the parent has been unable to remedy the circumstances that caused the child to be in an out-of-home placement, and (4) a substantial likelihood exists that the parent will be incapable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c).

### **1. Statutory Ground for Termination**

¶12 The court did not err by finding that the Department proved the 15 months in an out-of-home placement ground as a basis for termination. By the time of the termination hearing, N.K. had been in an out-of-home placement for over four years. Additionally, the record shows that the Department made diligent efforts to provide Father with appropriate reunification services, including urinalysis testing, substance-abuse treatment, parent-aide services, a psychological evaluation, domestic-violence counseling, anger-management counseling, parenting classes, a housing subsidy, and visitation. To regain physical custody of N.K., the Department required Father to (1) enroll N.K. in his local school district and (2) transfer N.K.'s DDD services to Father's home. From August 2016 to October 2017, Father had yet to take these actions; thus, he had failed to remedy the circumstances causing N.K.'s out-of-home placement. Father's inaction also supported the court's conclusion that Father would be incapable of exercising proper and effective parental care and control over N.K. in the near future.

¶13 Father disputes the court's finding that he would be unable to properly care for his son in the near future. Father first asserts that a realistic possibility existed that N.K. could be returned to his care "relatively soon." This claim fails, however, because the record shows that the only restrictions to returning N.K. to Father's care was enrollment in his school district and transfer of his DDD services. Yet for over one year, Father had failed to do so. Father's lack of diligence sufficiently supports the court's

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finding that terminating Father's rights was appropriate. Father next contends that the "testimony at trial suggested that the school district [would] not assign the child to a school until he [was] back in his father's care." Father's citations to the record, however, do not support this assertion. Moreover, the record shows that the Department asked Father to perform three tasks, two of which were required: school enrollment and transfer of DDD services. The third task, which was optional, asked Father to enroll N.K. in an afterschool program through DDD services. Only the third task required that Father have physical custody of N.K., however, so the record does not support Father's assertion that he needed physical custody of N.K. to perform the required tasks. Thus, this argument has no merit.

## 2. Best Interests

¶14 Father also argues that insufficient evidence supported the court's ruling that terminating his parental rights was in N.K.'s best interests. Terminating parental rights is in the child's best interests if the child will benefit from the termination or will be harmed if the relationship continues. *Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, 179 ¶ 20 (App. 2014). Relevant factors in this determination include whether the current placement is meeting the child's needs, an adoption plan is in place, and the child is adoptable. *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 3-4 ¶ 12 (2016). "Of course, a court need not automatically conclude that severance is in a child's best interests just because the child is adoptable; there may be other circumstances indicating that severance is not the best option." *Id.* at 4 ¶ 14.

¶15 Father's argument focuses on the court's finding that N.K. was adoptable. He claims that N.K. was not adoptable because N.K. was nearly 13 years old at trial, needed 24-hour care, was unable to walk or communicate, and no adoptive home had been located. Whether a child is adoptable, however, is only one factor that the court considers when making a best interests determination. Here, the court found that terminating Father's parental rights would allow N.K. to be adopted by a parent who would prioritize his needs. It also noted that N.K. needed permanency and stability in a home that would ensure that he received DDD services and school enrollment, which Father had failed to do. The court further found that N.K. would suffer a detriment if Father retained his parental rights because N.K. would be left in foster care waiting for Father to take actions that he had not performed for over a year. It also found that N.K. would be at risk for medical neglect because evidence showed that Father had not administered N.K.'s medication and formula

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as directed. Thus, sufficient evidence supported the juvenile court's finding that terminating Father's parental rights was in N.K.'s best interests.

**CONCLUSION**

¶16 For the foregoing reasons, we affirm.



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