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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

*v.*

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

No. 1 CA-JV 17-0584  
FILED 6-5-2018

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Appeal from the Superior Court in Maricopa County  
No. JD33345  
The Honorable M. Scott McCoy, Judge

**AFFIRMED**

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COUNSEL

Denise L. Carroll Esq., Scottsdale  
By Denise Lynn Carroll  
*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Sandra L. Nahigian  
*Counsel for Appellee*

**MEMORANDUM DECISION**

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Michael J. Brown joined.

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**T H O M P S O N**, Judge:

¶1 Devon F. (“father”) appeals the juvenile court’s decision to terminate his parental rights to N.T. on the ground of length of incarceration. *See* Ariz. Rev. Stat. (A.R.S.) § 8-533(B)(4) (2014). He also argues the state failed to prove by a preponderance of the evidence that severance was in the child’s best interest. For the following reasons, we affirm the juvenile court’s decision.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 Father is the biological parent of N.T., who was born September 13, 2011. When N.T. was born father was in prison serving a 1.5-year sentence for theft by means of burglary. He was released in mid-2013, re-arrested in September 2013 for aggravated assault, and arrested again in February 2014 for a dangerous drug violation. He was sentenced to 4.5 years for the aggravated assault and 2.5 years for the dangerous drug violation to be served concurrently. Father claimed he lived with N.T. and mother for about 8 months before his arrest in February 2014, when N.T. was approximately two and a half years of age. However, father’s presentence incarceration report (“the report”) stated that father described living a transient lifestyle between incarcerations and depended on homeless shelters for his daily needs. Additionally, the report stated that father had only alleged to have one child, a son living in Indiana.

¶3 N.T. came into the care of the Department of Child Safety (“DCS”) on October 20, 2016 after N.T. and her half-sister L.T. (“sister”) were left with their maternal aunt, who feared for their wellbeing and contacted the police. N.T. and sister had been living with their mother Susie T. (“mother”) who had become homeless and was abusing drugs. At the time that N.T. came into DCS’s care, father’s whereabouts were unknown, and father had not established paternity of N.T. Father was quickly located in the custody of the Department of Corrections (“DOC”) and the court ordered genetic testing to determine if he was the biological father of N.T., which was established on August 22, 2017.

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¶4 The original case plan was reunification. However, when mother failed to comply with services or make necessary behavioral changes, DCS requested changing the case plan to severance and adoption. Father objected, but the court granted the motion and DCS moved to sever father's parental rights on the length-of-sentence ground under A.R.S. § 8-533(B)(4).

¶5 At the severance hearing, father testified that he would be released from prison 13 days after the hearing. He also testified that he intended to get an apartment with his mother, and was prepared to undertake all necessary training and steps to care for N.T.

¶6 The DCS case manager testified that due to N.T. being diagnosed with Reactive Attachment Disorder, and because of the extensive abuse she suffered while under mother's care, delaying permanency and trying to introduce father into her life could cause significant harm to N.T.'s emotional wellbeing.

¶7 The court severed father's parental rights on the length-of-sentence ground, finding that although his imminent release did weigh in his favor, it was the entire length of incarceration, not just the remaining sentence, that must be considered. The court found that not only had he been in prison for the previous 4.5 years, but that he had also been incarcerated for the first two years of N.T.'s life and that was significant as it had deprived N.T. of a normal home for a period of years. The judge also noted that if N.T. was more emotionally stable and resilient, he might have come to a different conclusion, but because of her diagnosis and high needs, severance was in her best interest.

¶8 Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2014), 12-120.21(A)(1) (2018), and 12-2101(B) (2018).

## DISCUSSION

¶9 A parent's right to custody and control of his own child, while fundamental, is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49 ¶¶ 11-12 (2000). Severance of a parental relationship may be warranted where the state proves one of A.R.S. § 8-533's statutory grounds for termination by "clear and convincing evidence." *Id.*; A.R.S. § 8-863(B) (2014). "Clear and convincing" means the grounds for termination are "highly probable or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284-85, ¶ 25 (2005). Additionally, the court must also determine what is in the best interest of the child by a preponderance of the evidence. *Id.* at 283, ¶¶ 16, 22.

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¶10 “[W]e will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings, 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 (App. 2002). We do not reweigh the evidence, but “look only to determine if there is evidence to sustain the court’s ruling.” *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004).

**A. Statutory Grounds for Severance**

¶11 To terminate parental rights under A.R.S. § 8-533(B)(4), a court must find that “the sentence of [the] parent is of such length that the child will be deprived of a normal home for a period of years.” The time frame encompassed is the entire period of the parent’s incarceration and absence from the home, rather than the sentence which remained at the time of the severance proceedings. *Jesus M.*, 203 Ariz. at 206, ¶ 8.

¶12 In determining if the sentence of an incarcerated parent is of such length that the child will be deprived of a normal home for a period of years, the court should consider, but is not limited to, the following factors.

- (1) Length and strength of any parent-child relationship existing when incarceration begins,
- (2) degree to which parent-child relationship can be continued and nurtured during incarceration,
- (3) age of the child and relationship between child’s age and likelihood that incarceration will deprive the child of a normal home,
- (4) length of sentence,
- (5) availability of another parent to provide a normal home life, and
- (6) effect of deprivation of parental presence on child at issue.

*Michael J.*, 196 Ariz. at 251-52, ¶ 29.

¶13 Father argues that the juvenile court improperly applied the *Michael J.* factors in determining that DCS had met its burden of proof, especially in light of the fact that he was to be released from incarceration 13 days after the hearing. We disagree.

¶14 Father argues as to the first factor that the court unfairly found that the strength of his relationship with N.T. was unclear because he had spent less than a year with her but then found that N.T. had bonded with her adoptive placement whom she had known for only a year. However, the court actually found that not only had father been incarcerated for the four years prior to the severance but also for the first

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two years of N.T.'s life, and that, at best, father had spent less than a year with N.T. between his incarcerations. The court did not find father's testimony regarding his involvement with N.T. during that year to be credible and therefore the relationship between N.T. and father was unclear. Sufficient evidence supports the juvenile courts finding.

¶15 Although father testified that he had spent eight months to a year with N.T. between incarcerations, his Pre-sentence Incarceration Report stated that, in point of fact, he had actually lived a transient lifestyle and was dependent upon homeless shelters for his daily needs. Additionally, father only listed his having one child on the Report and it was not N.T.

¶16 As to factor two, the degree to which the parent-child relationship can be continued and nurtured during the incarceration, father both testified and argues on appeal that he wrote letters to N.T., participated in the services available to him while in prison, and kept in contact with the case manager. The court again found that father's testimony on these matters was not credible, and sufficient evidence supports this finding. The case manager testified that there was only one letter in the entire case file from father to N.T. Additionally, father never attempted to contact or nurture a relationship with N.T. prior to DCS's involvement.

¶17 As to factor three, father argues that N.T. was not deprived of a normal home because she was with mother for part of the time that he was incarcerated. However, sufficient evidence supports the courts finding that N.T.'s deprivation was severe given the abuse and trauma she suffered while in mother's custody while father was incarcerated. N.T. was diagnosed with Reactive Attachment Disorder, and has revealed to the case manager that she suffered sexual abuse while in the care of mother.

¶18 Father next argues that the court erred by failing to weigh the 13-day remaining sentence in his favor. However, the findings of fact and conclusions of law clearly state that the court weighed this in his favor, but found the deprivation that N.T. suffered since at least 2014 to be more compelling. As stated *supra*, N.T. suffered severe abuse and trauma while father was incarcerated since at least 2014.

¶19 As to factor five, father argues he was never given a chance to prove he could be competent. However, the factor does not ask whether father can be a competent parent, but whether there is another competent parent that could provide a normal home life. See *Michael J.*, 196 Ariz. at

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252, ¶ 29. In this instance the court found that mother was not able to do so due to her substance abuse, mental health, instability and abuse of N.T. For all the reasons stated in factors three and four, we find sufficient evidence supports the court's factor 5 finding.

¶20 Finally, as to factor six, father argues that if he were allowed to reunify, the child would not be deprived of a home and again contends that the court refused to consider that he was being released from prison in 13 days. The court found, and the evidence supports, that due to father's absence from N.T.'s life, she had been exposed to trauma and abuse, both physical and sexual. The court additionally found that "father's incarceration deprived the child of a normal home both due to the forced physical separation of parent and child due to incarceration, as well as his absence leaving no parent to protect the child from abuse by mother." As such, we find that the court did not abuse its discretion in severing father's rights under A.R.S. § 8-533(B)(4).

**B. Best Interests**

¶21 Severance is in a child's best interests if she would benefit from severance or be harmed by continuation of the parent-child relationship. *Maricopa Cty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990). Relevant factors include whether the child's existing placement is meeting the child's needs, whether the child is adoptable, and whether an adoptive placement is immediately available. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379-80 ¶¶ 30-33 (App. 2010). The evidence established that continuing the parent-child relationship would harm N.T., and that the existing placement is meeting N.T.'s needs and her present custodian is willing to adopt N.T. and her sister.

¶22 The juvenile court expressly found that termination was in the best interests of N.T. because no relationship existed between her and father. Additionally, the court found that N.T. would suffer a significant negative impact were the court to allow her to "languish in care longer and not terminate the parental rights." The court additionally found that N.T. is in the safe and stable home of people with whom she has developed a relationship and who have participated in ongoing services to address her diagnosis and help her develop trust with others. Therefore, the court did not abuse its discretion in finding that severance was in the best interest under A.R.S. § 8-533(B).

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**Conclusion**

¶23  
decision.

For the foregoing reasons we affirm the juvenile court's



AMY M. WOOD • Clerk of the Court  
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