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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/06/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

GREGORY B., TENE B., ) No. 1 CA-JV 11-0003  
)  
Appellants, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz. R.P. Juv. Ct. 103(G);  
SECURITY, JADA B., GREGORY B., ) ARCAP 28)  
JR., RAINY B., )  
)  
Appellees. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. JD506315

The Honorable Brian K. Ishikawa, Judge

**AFFIRMED**

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Sandra L. Massetto, Attorney-at-Law Phoenix  
By Sandra L. Massetto  
Attorney for Appellant, Gregory B.

Gates Law Firm, L.L.C. Buckeye  
By S. Marie Gates  
Attorney for Appellant, Tene B.

Thomas C. Horne, Arizona Attorney General Tucson  
By Claudia Acosta Collings, Assistant Attorney General  
Attorneys for Appellee, Arizona Department of Economic Security

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**K E S S L E R**, Judge

¶1 Tene B. ("Mother") and Gregory B. ("Father") separately appeal the juvenile court's order severing their parental rights with J.B., G.B., and R.B. (the "Children").<sup>1</sup> Both parents' rights were severed on grounds of abandonment pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(1) (Supp. 2010),<sup>2</sup> and Mother's rights were also severed pursuant to A.R.S. § 8-533(8)(a) and (c). For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 In a prior dependency with J.B., Mother and Father successfully completed services and J.B. was returned to their care in April 2008. The case was dismissed in September 2008. Three-year-old J.B. lived with her parents and siblings, G.B. (fourteen months old) and R.B. (one month old), for approximately nine months until January 2009, when Father was arrested for his role in a felony crime.<sup>3</sup> Soon after his arrest, Mother spoke to Father over the phone while he was in

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<sup>1</sup> J.B. was born 8/21/05, G.B. was born 11/13/07, and R.B. was born 12/19/08.

<sup>2</sup> We cite to the current version of the statute when no revisions material to this decision have occurred.

<sup>3</sup> In August 2009, Father pled guilty and was sentenced to 2.25 years' imprisonment.

the Pinal County jail, but thereafter, they did not have contact.

¶13 In Father's absence, Mother cared for the three Children. The family lived in a weekly rental, but Mother was preparing to move to a different home. On April 30, 2009, two adults were babysitting the Children. Though Mother thought they were playing at the park, the Children were found in a car with the adults while the adults were smoking marijuana. Upon going to the home Mother was trying to transition to, Child Protective Services ("CPS") determined that it was in an unfit condition because there was no running water, little food, and chemicals around. CPS was also concerned that Mother had substance abuse and mental health issues. The Children were taken into custody.

¶14 In May 2009, the Arizona Department of Economic Security ("ADES") filed a dependency petition.<sup>4</sup> Father's attorney was appointed at the initial dependency hearing held in early June 2009. After the continued initial dependency hearing in July 2009, the Children were found dependent with respect to Father. The Children were found dependent as to Mother in August 2009. Mother participated in mediation at

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<sup>4</sup> Father maintains that he did not receive the dependency petition until his attorney sent it to him. At the continued initial dependency hearing however, Father's counsel accepted service and waived defects.

which she agreed to participate in reunification services including a psychological and a psychiatric evaluation, substance-abuse assessment and subsequent treatment, urinalysis drug-testing, and parent-aide services. Mother admitted that she refused to submit to random drug-testing and acknowledges that she would not sign an agreement regarding visitation with the Children.

¶15 In August 2009, a new caseworker was assigned to the case. She reviewed the file and did not find correspondence from Father to the Children, or from Father to CPS. And she did not find any prior correspondence from CPS to Father.

¶16 In September 2009, the caseworker sent a letter to Father that provided her contact information. Father was encouraged to participate in any services he could while at the prison. Father maintained that he never got the letter.

¶17 In late January 2010, Father spoke to his attorney and requested visitation with the Children. CPS hired Dr. Glenn Moe to assess whether visitation was in the best interests of the Children. Dr. Moe was aware CPS would soon ask the juvenile court to change the case plan to severance, and did not think visitation would be in the Children's best interests. After his evaluation in March, visitation was denied.

¶18 The case plan was changed to severance and adoption as to both parents in April 2010, and CPS filed a motion to

terminate parental rights in May 2010.<sup>5</sup> At the initial severance hearing in May, Father made a record that he had not received a determination about visitation. CPS stated that it disclosed the report from Dr. Moe about visitation in March 2010 and offered to send it to Father's counsel again. Thereafter, in July 2010, Father requested telephonic visitation that never occurred. At the two-day severance hearing on November 2 and 3, 2010, both Mother and Father were present and testified.

¶9 In December 2010, after making findings of fact and conclusions of law, the juvenile court entered a final order severing Mother's and Father's parental rights based on abandonment pursuant to A.R.S. § 8-533(B)(1). The court also terminated Mother's right pursuant to A.R.S. § 8-533(B)(8)(a) and (c).

¶10 The court found Mother abandoned the Children for about 8.5 months, from April 2009 through January 2010; participated in only five out of twenty-three visits with the Children before the reunification service ended because Mother failed to meet her goals; did not send letters or gifts, provide financial support, or maintain consistent contact with the Children. The court concluded that Mother "abandoned the Children and failed to maintain a normal parental relationship"

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<sup>5</sup> The motion was amended twice to include statutory grounds in A.R.S. § 8-533(B)(8)(a) and (c) as to Mother.

with them by failing to provide reasonable support, maintain regular contact, or provide normal supervision.

¶11 The court determined that Father abandoned the Children under A.R.S. § 8-533(B)(1) by failing to maintain a normal parental relationship without just cause by failing to provide reasonable support or maintaining regular contact, and/or providing normal supervision. Between mid-January 2009, when Father became incarcerated, and April 2009, when CPS intervened and removed the Children, Father had no contact with the Children. The court further found that Father did not make contact with CPS until January 25, 2010 (9 months after the Children were taken into CPS custody) when his attorney requested visitation with the Children. The court also found that throughout the proceedings, Father never sent letters or gifts and did not provide support for the Children.

¶12 Finally, the court found that the preponderance of the evidence showed that severance of Mother's and Father's parental rights was in the Children's best interests because it would allow for adoption and a stable home.

¶13 Both Mother and Father appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and -2101(A),(B) (2003).

## DISCUSSION

### I. Mother

¶14 Mother contends that her efforts to engage in reunification services were thwarted by CPS, and therefore, the court should not have found that CPS made reasonable efforts to provide reunification services. Mother also argues that contrary to the court's finding, there was no evidence showing she would not be capable of caring for her Children in the near future. ADES argues that Mother cannot prevail because she failed to challenge the court's abandonment finding and severance determination on the basis of A.R.S. § 8-533(B)(1). ADES maintains that Mother has therefore waived any challenge to severance based on A.R.S. § 8-533(B)(1). See *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver . . . .").

¶15 We agree that Mother has waived any argument about abandonment. *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, 234 n.6, ¶ 14, 256 P.3d 628, 631 n.6 (App. 2011); see also *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (failing to develop an argument generally results in abandonment and waiver of the issue). Mother only challenges the court's determination as it relates to out-of-home placement under A.R.S. § 8-533(B)(8)(a) and (c), but an

independent statutory basis to affirm the juvenile court's severance determination under § 8-533(B)(1) still exists. Thus, we affirm the juvenile court on the grounds of abandonment and need not reach Mother's arguments related to A.R.S. § 8-533(B)(8)(a) and (c).

## **II. Father**

¶16 Father challenges the sufficiency of the evidence proving abandonment, and he claims his procedural due process rights were violated because he was excluded from proceedings. Father argues that severance based on abandonment was not proven because it requires a finding that 1) Father only made minimal efforts to support and communicate with the Children; and 2) Father failed to maintain normal contact for six months without just cause. Father claims that the facts show he was unable to communicate or support the Children and that "Father's action[s] alone were not responsible for not maintaining a normal relationship with his Children."

¶17 Father also maintains that as a result of his exclusion, his attorney was not able to effectively represent him.<sup>6</sup> He claims that the first time he was able to establish contact with his attorney was in January 2010.

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<sup>6</sup> Father asserts that his trial attorney was unaware of his positions on the issues due to Father's repeated absences from proceedings despite court orders.

¶18 More specifically, Father argues that because he was incarcerated at eight different facilities including protective segregation, and he was assigned to multiple correctional officers, he was prevented from participating throughout the proceedings. Over the course of the dependency and severance, Father was only present at two proceedings: the hearing to change the case plan to severance and adoption at the end of April 2010, and the contested severance hearing in November 2010.<sup>7</sup> And Father maintains that he never received the September 2009 letter from his CPS caseworker providing her contact information.<sup>8</sup> Father also contends that he was unable to make contact with his CPS caseworker, CPS never contacted him, and he was not advised of the necessary steps to preserve his parental rights.

¶19 ADES argues that reasonable evidence supports the court's finding of abandonment and its severance order because Father did not provide reasonable support or maintain regular

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<sup>7</sup> Father points out specifically that he was not present at the permanency hearing in September 2009, the hearing on January 8, 2010, the initial severance hearing on May 21, 2010, nor for the mediation during the dependency proceedings in August 2009. However, Father does not argue or explain any prejudice he suffered as a result of these absences.

<sup>8</sup> The caseworker did not confirm receipt. At trial, Father also maintained that he did not get notice of the dependency or served with the petition, and did not get the temporary custody notice.

contact with the Children. ADES also argues that Father failed to raise his due process claim below and that it is therefore waived on appeal.<sup>9</sup> ADES asserts that, in any event, Father's rights were not violated because he had notice and was present at the termination hearing at which he was represented and had an opportunity to be heard and challenge the evidence against him. And that to the extent he was not present at other proceedings, Father's rights were protected by counsel. Finally, ADES argues that Father has failed to assert or demonstrate prejudice from the alleged due process violation.

**A. Evidence of abandonment: A.R.S. § 8-533(B)(1)**

¶20 On appeal, this Court "accept[s] 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, 53 P.3d 203, 205 (App. 2002) (stating juvenile court is in best position to weigh evidence, observe parties, judge credibility of witnesses, and make fact-findings). If the juvenile court finds at least one statutory ground in A.R.S. § 8-533(B) proven by clear and convincing evidence, and that the preponderance of the evidence that severance is in the best interest of the child, it may terminate

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<sup>9</sup> ADES argues that the due process argument Father raises on appeal is different than the violation alleged below.

parental rights. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000); see also *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41, 110 P.3d 1013, 1022 (2005). Here, the court found that Father abandoned the Children under A.R.S. § 8-533(B)(1) because Father failed to maintain a normal relationship by providing reasonable support, regular contact, or normal supervision. "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 constitutes prima facie evidence of abandonment.

A.R.S. § 8-531(1).

¶121 The juvenile court "need only find sufficient evidence of intentional conduct which, when considered objectively, implicate[s] a conscious disregard of the obligation owed by the [parent] to [the] child." *Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 578, 869 P.2d 1224, 1231 (App. 1994) (first alteration in original) (internal quotation marks omitted); see also *Pima Cnty. Severance Action No. S-1607*, 147 Ariz. 237, 238, 709 P.2d 871, 872 (1985) (stating that to find abandonment there must be "evidence of intentional conduct on

the part of a parent which evinces a settled purpose to [forgo] all parental duties and relinquish all parental claims to the child") (internal quotation marks omitted). The intentions of parents are fact questions. *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990). But ultimately, abandonment is measured objectively by focusing on parents' actual conduct. *Michael J.*, 196 Ariz. at 249-50, ¶ 18, 995 P.2d at 685-86.

¶22 Here, Father claimed that he did not make contact with his Children or CPS because he could not afford to, did not know the address to send letters, and was limited by his restrictive housing situations.<sup>10</sup> However, other evidence indicates that during his incarceration Father was able to call and write to his mother multiple times, and he received a letter from her. And while he was in Pinal County jail, his mother was able to visit him twice. Father acknowledges that he was able to make contact with his mother and his attorney. But there is no

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<sup>10</sup> After his arrest, Father spent seven months in Pinal County jail in Florence, Arizona. In August 2009, Father was moved to Alhambra in Phoenix for a week. At the end of August he was moved to the Meadows unit at the prison in Florence for about a month before he moved to lockdown in the Moury unit at the Lewis prison in September 2009. Two months later he moved to another yard at the same complex. In January 2010, Father was moved to the Buckley unit at Lewis prison where he stayed for about a month.

evidence he attempted to have them or anyone else make contact with the Children on his behalf.

¶123 Moreover, Father's difficulties and limitations do not negate the fact that Father took no action to maintain contact or a relationship with his Children. Father did not have any contact with the Children since he became incarcerated. As the juvenile court found, Father had no contact with CPS or the Children from April 30, 2009 to January 25, 2010 and "[a]t no time during this dependency [beginning in April 2009 when the Children were removed from the home] did Father send any cards, letters, or gifts to the children nor did Father provide any support for the children." The court found the first contact Father had with CPS was when his attorney contacted CPS in January 2010 asking for visitation nine months after CPS removed the Children.

¶124 We recognize that Father had difficult circumstances, but when "circumstances prevent the . . . father from exercising traditional methods of bonding with his child, he must act persistently to establish the relationship however possible and must vigorously assert his legal rights to the extent necessary." *Pima Cnty. Juv. Severance Action No. S-114487*, 179 Ariz. 86, 97, 876 P.2d 1121, 1132 (1994). Father did not present evidence of objective actions he took that indicate his intentions to fulfill his parental duties. To the contrary,

Father thought CPS would have told him to write to the Children and given him an address if that is what was expected of him. This is insufficient as it was up to Father to take action to have contact with the Children. In addition, Father contended that he did not know he should contact CPS and that he thought CPS was going to set-up visitation for him. But he also acknowledged that he knew he needed to contact CPS about the Children. Father's inaction is particularly notable because he contends that CPS was not contacting him or keeping him informed.

¶125 Finally, Father's purported inability to make contact with the Children is belied by his trial admissions that he "didn't feel [he] was allowed to write them. [He] didn't know their address. [He didn't] know the foster parents' address." And while Father first made contact with CPS in January 2010 to request visitation, this was at least six months after he learned of the dependency proceedings and his attorney had been appointed.

¶126 Father testified that it was not until January 2010 when he could speak to his attorney and request visitation.<sup>11</sup> But apart from his trial testimony, there is no other evidence in the record to support his assertions. And importantly,

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<sup>11</sup> Father testified he lost contact with his attorney from June 2009 to January 2010.

Father's assertion is at odds with his other trial testimony in which he acknowledged that "around July [2009] I got a hold of [my attorney]." At the severance hearing Father acknowledged that he knew where to reach his attorney and that he could have asked his attorney for contact information for CPS and the Children. And he knew he needed to contact CPS about the Children. In short, Father was aware of steps he needed to take and his limitations do not negate his inaction until January 2010.

¶127            Though it may have been difficult for Father to take appropriate action, Father took almost no action. Father does not point to evidence that objectively demonstrates his meaningful efforts to maintain a relationship with the Children or provide care or concern for their well-being. Nor does he present evidence of his efforts to stay apprised about the case. Although at trial Father asked that he be given a six-month chance to prove he would care for the Children upon his release, his subjective future intent does not outweigh his inaction or the lack of objective evidence showing that he wanted to maintain a normal relationship with the Children and assert his legal rights.

¶128            Father's claim that abandonment cannot be found without determining that a parent has only made minimal efforts and failed to maintain normal contact for six months without

just cause, is misplaced. The definition of abandonment specifically states: "Abandonment *includes* a judicial finding that a parent has made only minimal efforts to support and communicate with the child." A.R.S. § 8-531(1) (emphasis added). Similarly, the "[f]ailure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes *prima facie* evidence of abandonment." *Id.* (emphasis added). These provisions in the statute are instructive, not mandatory determinations.

¶129 In sum, we cannot say that "no reasonable evidence" supports the juvenile court's fact-findings or that severance based on abandonment was clearly erroneous. See *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205.

#### **B. Due Process**

¶130 Throughout the dependency and severance proceedings, Father never asserted that he was excluded from proceedings in violation of his due process rights. To the contrary, the case proceeded to the severance hearing without objection, and Father was present and testified at the hearing. In his written closing argument Father made an assertion that his due process rights were violated, but Father only claimed that "[i]t is a violation of due process and a misuse of the abandonment statute to assert that Father should be severed due to his alleged failure to visit or contact the kids, when CPS proscribed it."

Nothing in the record indicates Father objected or raised the due process claim in the juvenile court that he now raises on appeal. "We will not consider appellants' objection presented for the first time on appeal." *Torres v. N. Am. Van Lines Inc.*, 135 Ariz. 35, 39, 658 P.2d 835, 839 (App. 1983) (determining grounds for objection presented to the trial court are not the grounds appellants presented on appeal). Thus, his claim is waived. *Crowe v. Hickman's Egg Ranch, Inc.*, 202 Ariz. 113, 116, ¶ 16, 41 P.3d 651, 654 (App. 2002) ("Issues not properly raised below are waived.").

¶31 Nor does Father explain how he was prejudiced. He does not contend that the proceedings would have been different or that he would have done anything different had the alleged violation not occurred. Here, Father was represented by counsel, and he participated at the severance hearing including testifying, presenting evidence, and cross-examining the witnesses. See *Christy A. v. Ariz. Dep't Econ. Sec.*, 217 Ariz. 299, 306, ¶ 24, 173 P.3d 463, 470 (App. 2007) (stating a parent's right of participation includes the right to be present at the severance hearing, cross-examine witnesses, and to testify). The court found severance based on Father's failure to maintain a parental relationship with the Children as evidenced by Father's objective acts. Any alleged due process violation did not prevent Father from showing at the severance

hearing how he had attempted to stay in contact with the Children during his incarceration.

### **III. Best Interests of the Children**

¶32 The court will not "assume that a child will benefit from a termination simply because he has been abandoned," *JS-500274*, 167 Ariz. at 5-6, 804 P.2d at 734-35, but rather it must be shown that termination benefits the child or prevents the continuation of a harmful relationship. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App. 2008). The court must find by a preponderance of the evidence that termination is in the best interest of the child. *Id.*; see also *Kent K.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022. Factors the court may consider include the child's adoptability or potential adoptive placement and whether the current placement is meeting the child's needs. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5, 982 P.2d 1290, 1291 (App. 1998); see also *Maricopa Cnty. Juv. Action No. JD-561*, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981) (explaining good physical care and emotional security are implied in a child's right to effective parental care).

¶33 Here, the juvenile court found that severance was in the Children's best interests because it would allow for adoption and a stable home. *JS-501568*, 177 Ariz. at 579, 869 P.2d at 1232 ("[T]ermination provides a clear benefit to the

child by permitting [the child] to be adopted by the couple [the child] has regarded as her parents for over two years." ). The Children were cared for by their foster parents (the same parents that cared for J.B. during the previous dependency) for over a year. The Children were all placed together and developed normal bonds with their foster parents. And the foster parents wanted to adopt the Children. In addition, the foster parents were successfully attending to the Children's individual special physical and developmental needs. Accordingly, there is sufficient evidence to show the termination was in the Childrens' best interests.

**CONCLUSION**

¶134 For the foregoing reasons, we affirm the juvenile court's severance of Mother's and Father's parental rights.

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DONN KESSLER, Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
MARGARET H. DOWNIE, Presiding Judge

\_\_\_\_\_/S/\_\_\_\_\_  
PETER B. SWANN, Judge