IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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KYLE B.,
*Appellant*,

*v.*

DEPARTMENT OF CHILD SAFETY AND A.B.,
*Appellees*.

No. 2 CA-JV 2015-0105
Filed October 13, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

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Appeal from the Superior Court in Pima County
No. JD20140114
The Honorable Jane Butler, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Scott W. Schlievert, Tucson
*Counsel for Appellant*

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
*Counsel for Appellee Department of Child Safety*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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E C K E R S T R O M, Chief Judge:

**¶1** Kyle B. appeals from the juvenile court's May 2015 order terminating his parental rights to his son, A.B., born in April 2009, on length-of-incarceration and time-in-care grounds. *See* A.R.S. § 8-533(B)(4), (8)(a). Because A.B. is an "Indian child," these proceedings are subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963. *See* 25 U.S.C. § 1903(4) (defining "'Indian child'"). Kyle contends there was insufficient evidence to support the court's termination order under either ground. Finding no error, we affirm.

**¶2** A juvenile court may terminate a parent's rights if it finds clear and convincing evidence of one of the statutory grounds for severance and finds by a preponderance of the evidence that termination is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 22, 41, 110 P.3d 1013, 1018, 1022 (2005). We will not disturb a court's severance order unless the factual findings upon which it is based "are clearly erroneous, that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). "[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court's decision . . . ." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009).

**¶3** The Department of Child Safety (DCS)[1] took temporary custody of then-four-year-old A.B. in February 2014 based on a report that the mother, who was "severely intoxicated, smelled of alcohol, slurred her words and was stumbling as she tried to walk and actually fell down once," had left A.B. unattended at the Tucson Public Library.[2] Kyle, whose whereabouts were unknown at the time, had been inconsistently involved in A.B.'s life. Kyle was served with a dependency petition in Indiana in May 2014, and although he returned to Arizona in August 2014, he refused to participate in case-plan services here. In November 2014, after A.B. had been in DCS custody for almost nine months, Kyle was incarcerated as a result of a robbery offense.

**¶4** The juvenile court adjudicated A.B. dependent as to Kyle at a November 2014 dependency hearing. In January 2015, the court changed the case plan goal to severance and adoption, and DCS filed a motion to terminate Kyle's parental rights to A.B. in February 2015 based on length-of-incarceration and time-in-care grounds. *See* § 8-533(B)(4), (8)(a). At a May 2015 termination hearing, Kyle testified he had been convicted of robbery and sentenced to 1.5 years' imprisonment.[3] The maternal grandmother, who wants to adopt A.B. and has cared for him for "[m]ost of his life," testified that Kyle had not provided support for A.B. or maintained "regular[]" contact with him.

**¶5** The case manager for the Tohono O'odham Nation opined that placing A.B. in Kyle's custody "would likely result in serious emotional and physical harm" to him; she based her opinion on the fact that Kyle was currently incarcerated "and he won't be

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[1]The Department of Child Safety is substituted for the Arizona Department of Economic Security in this decision. *See* 2014 Ariz. Sess. Laws 2d Spec. Sess., ch. 1, §§ 6, 20, 54.

[2]The juvenile court terminated the parental rights of A.B.'s mother in March 2015. She is not a party to this appeal.

[3]On January 20, 2015, Kyle was sentenced to a 1.5-year prison term with sixty days of presentence incarceration credit.

released for at least another year, and that he [has] not fully parented his son." The DCS case manager also testified that, with the exception of a recent conversation, A.B. "doesn't really talk about his dad"; she was aware of Kyle seeing A.B. only "one time"; and, Kyle had not sent any cards, gifts, or letters to A.B. since he was incarcerated. She also testified that Kyle would need to participate in services for "another year" after he is released from prison, and concluded that termination was in A.B.'s best interests because it would provide him with stability and permanency, rather than leaving him "in limbo." At the conclusion of the severance hearing, the juvenile court found termination warranted on both alleged grounds and that it was in A.B.'s best interests to sever Kyle's parental rights. This appeal followed.

**¶6** Kyle argues there was insufficient evidence to terminate his parental rights to A.B. based on length of incarceration. A juvenile court may terminate a parent's rights pursuant to § 8-533(B)(4) when "the parent is deprived of civil liberties due to the conviction of a felony" and "the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." In evaluating whether the length of a person's prison term is sufficient to justify termination, the court must consider all relevant circumstances including but not limited to the following:

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

> whether the sentence is of such a length as to deprive a child of a normal home for a period of years.

*Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 251-52, 995 P.2d 682, 687-88 (2000).

**¶7** Kyle asserts that "[o]n balance, the[ *Michael J.*] factors weigh in [his] favor" for the following reasons: (1) until DCS was involved, he "had a regular ongoing relationship" with A.B.; (2) "[t]here is no reason [he] cannot continue and nurture his relationship" with A.B. while he is incarcerated; (3) and (4) based on his belief that he "would be released in May, 201[6] rather than July, 201[6]," there was no basis for the juvenile court to find A.B. would be deprived of a home for a critical period of his life; (5) Kyle concedes there is no other parent to provide a normal home life, but asserts because we have not found this factor dispositive in other cases, the court should not have done so here, *see Ariz. Dep't of Econ. Sec. v. Rocky J.*, 234 Ariz. 437, 323 P.3d 720 (App. 2014); *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 225 P.3d 604 (App. 2010);[4] and, (6) in light of "the significant amounts of time" he has spent with A.B., who is too young to "make a decision about" severing his relationship with his father, severance was improper.

**¶8** Notably, § 8-533(B)(4) "does not specify any certain amount of time for the sentence." *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 14, 972 P.2d 684, 687-88 (App. 1998). Nor is the length of a parent's sentence, "[b]y itself . . . dispositive" of termination under § 8-533(B)(4). *Jesus M. v. Ariz. Dep't of Econ. Sec.*,

[4]As the state argues in its answering brief, both cases Kyle relies upon involved appeals by DCS to determine whether the juvenile court had erred in finding DCS had failed to prove severance should be granted based on length of incarceration; however, those cases did not necessarily hold, as Kyle suggests, that the factors at issue weighed against severance. *See Rocky J.*, 234 Ariz. 437, ¶ 12, 323 P.3d at 723; *Matthew L.*, 223 Ariz. 547, ¶ 9, 225 P.3d at 606.

203 Ariz. 278, ¶ 9, 53 P.3d 203, 206 (App. 2002). "Instead, the juvenile court must consider the many facts and circumstances specific to each case." *Id.* Here, the juvenile court found facts existed establishing the elements of the statute. It also found that, "given the young age" of A.B., Kyle's 1.5-year prison sentence "is significant," and that A.B. "would be deprived of a home for a very critical period of his life for a period of years." The court also noted that if A.B. "was a teenager, I might find differently, if there was a demonstrated bond between him and the father." And, the court also concluded that termination was in A.B.'s best interests.[5]

**¶9** Although the juvenile court did not discuss each of the *Michael J.* factors in its ruling, we infer any other findings necessary to sustain the court's ruling. *See Marco C. v. Sean C.*, 218 Ariz. 216, n.3, 181 P.3d 1137, 1141 n.3 (App. 2008). Moreover, there is reasonable evidence to support termination of Kyle's parental rights on this ground. The record establishes the following: before his incarceration, Kyle had not consistently spent time with A.B. or provided regular or meaningful financial support for him; although he maintains "[t]here is no reason [he] cannot continue and nurture his relationship" with A.B. while he is incarcerated, Kyle had not sent any gifts, cards, or letters to A.B. since he had been incarcerated; once Kyle is released from prison, he would need to participate in services for approximately one year before A.B. could be placed in his care; and, because the mother's parental rights to A.B. have been terminated, there is no other parent to care for A.B. during Kyle's incarceration. And, "[a] lack of evidence on one or several of the *Michael J.* factors may or may not require reversal or remand on a severance order." *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 15, 153 P.3d 1074, 1079 (App. 2007).

**¶10** By pointing out conflicting evidence in the record, Kyle apparently asks us to reweigh the evidence on appeal.[6] "The

[5]Because Kyle does not challenge the juvenile court's best interests finding on appeal, we do not address it.

[6]In fact, during his closing argument at the severance hearing, Kyle's attorney pointed out that A.B. "presumably has spent some

juvenile court, not this court, is 'in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings.'" *Bennigno R. v. Ariz. Dep't of Econ. Sec.*, 233 Ariz. 345, ¶ 31, 312 P.3d 861, 867 (App. 2013), *quoting In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). "Consequently, we will not reweigh the evidence or substitute our judgment for that of the juvenile court," *id.*, and we affirm the court's termination of Kyle's parental rights to A.B.

**¶11** Finally, because we conclude the juvenile court properly found termination warranted pursuant to § 8-533(B)(4), we need not address Kyle's arguments related to subsection (B)(8)(a), length of time in care. *Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205. Accordingly, we affirm the court's order terminating Kyle's parental rights to A.B.

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time, we don't know exactly how much, with [Kyle]. . . . We don't know how many days or how many months. But there is some conflict there."