

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

NIKITA K., *Appellant,*

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, M.K., T.K.,
Appellees.

No. 1 CA-JV 13-0094
FILED 12-19-2013

Appeal from the Superior Court in Navajo County
S0900JD201100051
The Honorable Michala M. Ruechel, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Mesa
By Amanda Holguin

Counsel for Appellee Arizona Department of Economic Security

The Wood Law Office, Show Low
By Ronald D. Wood

Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Andrew W. Gould delivered the decision of the Court, in which Judge Donn Kessler and Judge Michael J. Brown joined.

G O U L D, Judge:

¶1 Nikita K. (“Mother”) appeals the juvenile court’s order terminating her parental rights and requests a new trial. Because we find no error, we affirm the juvenile court’s order.

Facts and Procedural History

¶2 Mother has a history of alcohol and marijuana use. The Arizona Department of Economic Security (“ADES”) received a report on December 20, 2011 that Mother and her newborn, M.K., tested positive for marijuana, opiates, and benzodiazepines. Mother admitted using marijuana and Xanax while pregnant. M.K. was born with extremely low birth weight and was small for her gestational age; her treating physicians opined that Mother’s drug use caused an intrauterine growth restriction or fetal retardation. M.K. was placed on a special diet and required feedings every three hours. Mother and Father did not give M.K. her nighttime feedings, claiming they were too tired and unable to wake up to care for her. The hospital staff were concerned that Mother would not provide for the child’s medical needs after being discharged from the hospital.

¶3 In late December ADES took temporary custody of M.K., placing her in the physical custody of her paternal great aunt and uncle, and filed a dependency petition alleging she was dependent. The juvenile court later adjudicated M.K. dependent, and ADES implemented a case plan of family reunification, offering Mother and Father substance-abuse assessments and treatment, random drug testing, individual counseling, parenting classes, supervised visits, parent-aid services, and transportation.

¶4 Mother and Father’s substance-abuse counselor believed both of them most likely suffered from a substance dependence disorder and referred them for random drug testing and substance-abuse treatment. Over the next few months both tested positive for a variety of

NIKITA K. v. ADES, et al.
Decision of the Court

drugs, and the counselor was also concerned they were abusing prescription drugs. However, Mother and Father were participating in random drug tests, and M.K. had gained three pounds in foster care. As a result, ADES returned M.K. to her parents' physical custody on February 22, 2012, and continued to provide them with reunification services, as well as food stamps, baby supplies, and daycare assistance. ADES also provided Mother and Father with transportation to M.K.'s doctor appointments, and helped them transition into a sober-living house with their two other children.

¶5 Over the next two months, Mother failed to take most of her drug tests and Mother and Father tested positive for drugs and alcohol. After holding a meeting addressing concerns regarding the children's safety in the home, ADES filed an in-home dependency petition on May 10, 2012, alleging that Mother and Father were unable to parent due to alcohol and drug use. Subsequently, Mother and Father failed to attend their scheduled intake appointments and parenting class, and failed to seek medical attention for T.K. when he was sick. On May 22, 2012, Father was arrested and charged with disorderly conduct after his attempt to trade alcohol for prescription drugs led to a physical altercation. Consequently, the family was evicted from the sober living house, and ADES removed the children, placed them in foster care, and filed its first amended supplemental dependency petition with regard to T.K. and K.Q.¹ The juvenile court later adjudicated T.K. dependent as to Mother and Father.

¶6 Upon removal of the children from their parents' care, a doctor's evaluation revealed that T.K. had a fever, two ear infections, and a sinus infection; M.K. had an eye infection and was underweight; and K.Q. was severely developmentally delayed and lacked the appropriate level of education for a five-year-old. On June 8, 2012, despite ADES's continued provision of substance-abuse services, neither parent complied with the services and both tested positive for methamphetamine. On November 19, 2012, Mother submitted a urine sample that tested positive for methamphetamine, opiates, and hydrocodone.

¶7 On January 15, 2013, the juvenile court held a permanency hearing and approved ADES's case plan of severance and adoption.

¹ K.Q. is another minor child that lived with Mother and Father. K.Q. is not the biological child of Father, and Mother's parental rights to K.Q. are not a subject of this appeal.

NIKITA K. v. ADES, et al.
Decision of the Court

Mother was present, and the juvenile court informed her that her attendance at the termination hearings, including pretrial hearings, was required, and her failure to attend could result in finding she waived her legal rights and admitted the allegations in the termination motion, allowing the court to terminate her parental rights. A few days later, ADES filed a motion to terminate Mother's parental rights to M.K. and T.K. on the ground of substance abuse under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(3), and alleged that termination of parental rights was in the children's best interests.

¶8 On February 12, 2013, appearing telephonically at the initial termination hearing, Mother denied ADES's allegations and requested a trial. The court ordered Mother to appear at the March 19, 2013 pretrial hearing and the April 8, 2013 termination hearing, warning her that her failure to appear could lead to the termination of her parental rights.² ADES informed Mother she would be provided with transportation to the hearings if she called "in sufficient time to make the arrangements."

¶9 On March 4, 2013, Mother filed a motion requesting the juvenile court order a social study pursuant to A.R.S. § 8-536(A), and the court granted the motion.

¶10 Mother did not appear at the March 19, 2013 pretrial hearing. She had not requested transportation to the hearing, and her attorney informed the court that he did not know why she was not present. The juvenile court found that Mother had failed to appear without good cause, that she had received proper notice of the hearing, and that she had been admonished of the consequences of her failure to appear. The juvenile court found that she had therefore waived her legal rights and admitted the allegations in ADES's termination motion. The court proceeded in Mother's absence and heard testimony from Child Protective Services ("CPS") unit supervisor Scott Chasan. Mother's attorney moved to continue the termination hearing to April 8, 2013 due to a scheduling conflict, and the court granted his request.

¶11 Mother did not appear at the April 8, 2013 termination hearing, and the juvenile court again found that she had received actual

² Although the juvenile court's minute entry mistakenly states that the court scheduled a "dependency trial" on April 8, 2013, it is clear from the record that the parties understood the April 8th hearing was a termination adjudication hearing.

NIKITA K. v. ADES, et al.
Decision of the Court

notice of the hearing and had been admonished of the consequences of her failure to appear. The court also affirmed its findings that Mother failed to appear at the March 19, 2013 pretrial hearing without showing good cause and therefore she had waived her rights and admitted the allegations in ADES's termination motion.

¶12 At the April 8 termination hearing, Mother's attorney informed the juvenile court he "just got the order ... that a social study be prepared" and stated that he was "not certain" whether it needed "to be done before the termination hearing" but that if it did, he wanted the opportunity to review it; otherwise the court could "just proceed" with the termination hearing. ADES argued that Mother's reliance on A.R.S. § 8-536(A) was misplaced because the statute required a social study be prepared upon a filing of a petition to terminate parental rights, whereas ADES had filed a motion. ADES also argued that the social study "would simply be a compilation of the court reports" that had previously been admitted into evidence at prior hearings. The juvenile court waived the social study and proceeded to hear testimony from Scott Chasan.

¶13 Chasan testified that his qualifications included a bachelor's degree in psychology with an emphasis on early childhood development, a master's degree in social work with an emphasis in counseling, twenty years of experience as a CPS case manager, and various training on substance abuse, permanency, and child abuse and neglect. His substance abuse training included leading and facilitating substance-abuse outpatient groups during his master's program and "numerous trainings on how to evaluate, how to assess, how to understand, [and] how to work with substance abusers" since that time. Chasan also noted that during his twenty years with CPS he had worked with several individuals who had substance abuse issues, and that his duties required him to review parents' substance abuse records, meet with their treatment providers, and formulate opinions about whether parents were unable to discharge their parental responsibilities on account of substance abuse.

¶14 In regard to Mother, Chasan testified that despite ADES's efforts to provide Mother with treatment services, she had failed to make "the behavioral changes necessary that would make the children safe" in her care. He also testified that Mother's continued substance abuse prevented her from parenting responsibly, and that the children were adoptable, they were bonded with their placement, and the placement was willing to adopt them. He further testified that termination of Mother's parental rights would provide the children with permanency and stability in a drug-free home.

¶15 The juvenile court found that ADES had proved the alleged grounds by clear and convincing evidence and that termination of Mother's parental rights was in the children's best interests by a preponderance of the evidence. The court ordered termination of Mother's parental rights and she appealed. The court then filed formal findings of fact, conclusions of law, and an order terminating Mother's parental rights on May 20, 2013. This court has jurisdiction under A.R.S. §§ 8-235, 12-120.21(A)(1), and -2101(A)(1).³

Discussion

¶16 Mother argues on appeal that the juvenile court erred by: (1) proceeding without a social study, (2) finding that by not appearing Mother admitted ADES's allegations, and (3) qualifying Chasan as an expert and relying exclusively on his testimony. We consider each issue in turn.

¶17 We will not disturb a juvenile court's order terminating a parent's rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). On review, we view the evidence in the light most favorable to upholding the factual findings upon which the order is based. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000). We will affirm the order as long as at least one statutory ground has been established by clear and convincing evidence. *Id.* at 249, ¶ 12.

I. Waiver Of Social Study

¶18 Mother argues the juvenile court abused its discretion in terminating her parental rights because no social study was prepared as required by A.R.S. § 8-536(A). We disagree.

¶19 First, as ADES correctly notes, there is no express requirement that a social study be prepared where a severance action is brought by motion rather than by a petition. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 43, ¶¶ 13-14, 178 P.3d 511, 515 (App. 2008) (holding that "[o]ur juvenile statutes provide for two separate procedural mechanisms by which a termination of parental rights may be obtained," which consist of filing of a petition under A.R.S. § 8-533, or by filing a

³ *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981) (recognizing the Court of Appeals has jurisdiction over premature appeal once subsequent final judgment is entered).

NIKITA K. v. ADES, et al.
Decision of the Court

motion under A.R.S. § 8-861, *et. seq.*). The social study requirement set forth in A.R.S. § 8-536(A) expressly applies to the “filing of a petition” to sever parental rights. Here, however, ADES did not file a severance petition; rather, it brought a severance action by motion after the juvenile court held a permanency hearing pursuant to A.R.S. § 8-862. Thus, the social study requirement of A.R.S. § 8-536(A) did not apply to ADES’s severance motion. *See* A.R.S. § 8-532(C) (statutes, including § 8-536, governing proceedings to terminate parent-child relationship do not apply to termination proceedings following permanency determination conducted pursuant to A.R.S. § 8-861, *et. seq.*).

¶20 Second, assuming a social study was required, we conclude that any resulting error was harmless. We note that the juvenile court had discretion to waive the social study if it determined it was in the best interests of the child to do so. A.R.S. § 8-536(C); *In re Pima Cnty. Juvenile Action No. S-2710*, 164 Ariz. 21, 24, 790 P.2d 307, 310 (App. 1990), *disapproved on other grounds by Matter of Appeal in Maricopa Cnty. Juvenile Action No. JS-500274*, 167 Ariz. 1, 804 P.2d 730 (1990). Here, Mother’s counsel did not object to proceeding with the termination hearing without a social study. In addition, ADES urged the juvenile court to waive the social study because it “would simply be a compilation of the court reports” that had already been admitted as evidence in other proceedings. Indeed, the testimony of CPS case worker Chasan at the termination hearing covered the primary issues that would be covered by a social study. *See S-2710*, 164 Ariz. at 24 (concluding there was no error where juvenile court waived social study because “[e]vidence was presented on all crucial issues a social study would likely address”). Under these facts, we find no abuse of discretion.⁴

⁴ The juvenile court did not make any express findings regarding all the factors it considered in waiving the social study. Nonetheless, we must assume the trial court considered each factor that was necessary to waive the social study. *Horton v. Mitchell*, 200 Ariz. 523, 526, ¶ 13, 29 P.3d 870, 873 (App. 2001) (stating that when the trial court does not make specific findings of fact, “we ‘must assume that the trial court found every fact necessary to support its [ruling] and must affirm if any reasonable construction of the evidence justifies the decision’”) (internal citations omitted); *In the Matter of CVR 1997 Irrevocable Trust*, 202 Ariz. 174, 177, ¶ 16, 42 P.3d 605, 608 (App. 2002) (“Because there are no findings of fact or conclusions of law, we presume that the trial court found every fact necessary to sustain its ruling and will affirm if any reasonable

II. Admission Of Allegations Based On Non-Appearance

¶21 Mother asserts the juvenile court abused its discretion in finding that her absence constituted an admission of the allegations against her.

¶22 A juvenile court has the discretion to terminate parental rights if a parent, after being properly served and notified of the proceedings and previously warned that failure to appear could constitute a waiver of rights and admission to the allegations, nevertheless fails to appear at a termination adjudication hearing without good cause. Ariz. R.P. Juv. Ct. 66(D)(2).

¶23 Here, Mother does not argue that she lacked notice of the hearing or was improperly served. Mother also does not dispute the fact she was warned that her failure to attend the hearing could result in the juvenile court's proceeding in her absence and terminating her parental rights. Finally, Mother has not made any showing of good cause to excuse her absence.⁵ *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304-05, ¶ 16, 173 P.3d 463, 468-69 (App. 2007). Accordingly, we find no abuse of discretion.

III. Expert Testimony

construction of the evidence supports its decision.""). Thus, we review the record to determine if there was reasonable evidence supporting the juvenile court's decision to waive the social study. *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003) ("We defer to the judge with respect to any factual findings explicitly or implicitly made, affirming them so long as they are supported by reasonable evidence.")

⁵ On appeal, Mother alleges she "had no way to get there [to the hearing]." Mother did not raise any issue concerning a lack of transportation in the juvenile court, and therefore may not raise this issue for the first time on appeal. *In re Marriage of Pownall*, 197 Ariz. 577, 583, ¶ 27, 5 P.3d 911, 917 (App. 2000). Moreover, the record reflects the fact that ADES informed Mother that she would be provided with transportation as long as she requested it within a reasonable time. Additionally, Mother does not assert, nor is there any evidence in the record to show that she made such a request for either the March 19 or April 8 severance hearings.

NIKITA K. v. ADES, et al.
Decision of the Court

¶24 Finally, Mother asserts that the juvenile court abused its discretion in qualifying CPS case worker/supervisor Chasan as an expert witness and relying on his expert testimony in severing her parental rights. Mother argues Chasan was not qualified to testify as an expert “in the area of what parenting skills Mother needed [and] what changes would be needed for her to parent, nor did he testify as to his credentials regarding the prediction of future behavior.” Mother challenges Chasan’s competence to testify as an expert under Arizona Rule of Evidence 702. **[OB at 10-13]**

¶25 Trial judges are afforded “broad latitude” in determining whether to admit expert testimony based on the particular case at hand. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999).

¶26 The record shows that Chasan had sufficient training and experience to testify as an expert witness. Chasan possessed twenty years experience working as a case manager and was employed at the time of the hearing as a unit supervisor. He held a bachelor’s degree in psychology with an emphasis in early childhood development and a master’s degree in social work with an emphasis in counseling. He had completed almost 900 hours of training since completing his master’s program in the areas of substance abuse, permanency, child development, and child abuse and neglect, qualifying in court as an expert on several occasions. Mother’s objections go to the weight, not admissibility, of Chasan’s testimony. We find no abuse of discretion.⁶

⁶ Mother asserts that the juvenile court failed to make the requisite findings under Rule 702, Arizona Rules of Evidence, when it admitted Chasan’s testimony. Mother did not raise this claim of error at the juvenile court and therefore may not raise it on appeal. *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (“Failure to raise a *Daubert* challenge at trial causes a party to waive the right to raise objections to the substance of expert testimony post-trial.”); *Trantor v. Fredrikson*, 179 Ariz. 299, 200, 878 P.2d 657, 658 (1994) (“[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.”).

NIKITA K. v. ADES, et al.
Decision of the Court

Conclusion

¶27 Because the juvenile court did not abuse its discretion, the order terminating Mother's parental rights is affirmed.



Ruth A. Willingham - Clerk of the Court
FILED: mjt