DIVISION ONE
FILED: 06/14/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JONATHAN V.,	)	No. 1 CA-JV 11-0018
	)	1 CA-JV 11-0034
Appellant,	)	(Consolidated)
	)	
v.	)	DEPARTMENT E
	)	
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, TIFFANY V.,	)	**MEMORANDUM DECISION** (Not for Publication - 103(G) Ariz.R.P. Juv. Ct.; Rule 28 ARCAP)
Appellees.	)	

Appeal from the Superior Court in Mohave County

Cause No. JD2010-04016

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Mohave County Appellate Defender — Kingman
By Diana S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General — Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Kelley Moss & Holden, PLLC — Bullhead City
By Michele Holden
Attorneys for Appellee Tiffany V.

O R O Z C O, Judge

¶1 Appellant Jonathan V. (Father) appeals a juvenile court order terminating his parent-child relationship with his child (T.V.). He claims the juvenile court erred because: (1) his consent to the adoption of T.V. was invalid due to fraud or duress; (2) the Arizona Department of Economic Security (ADES) did not present clear and convincing evidence to establish grounds for termination based on neglect pursuant to Arizona Revised Statutes (A.R.S.) section 8-533.B.2 (Supp. 2011);[1] and (3) ADES failed to present sufficient evidence to support the court's finding that adoption was in T.V.'s best interest. Father also argues: (4) the juvenile court erred in denying his motion to set aside the order terminating his parental rights; (5) the superior court erred by denying his motion for change of judge for cause because the juvenile court judge was prejudicially biased; and (6) the juvenile court erred in denying father relief based on his claim of ineffective assistance of counsel. For the reasons set forth herein, we affirm all orders.

PROCEDURAL AND FACTUAL HISTORY

¶2 Father is the biological parent of T.V. He is also the biological parent of M.V. and M.B. In March 2007, Father pled guilty to felony child abuse of M.V., and was ordered to have no further contact with the child. Father's parental rights to M.V.

[1] We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

were later terminated after the juvenile court found he had neglected or willfully abused M.V. and that the termination of his parental rights was in M.V.'s best interest.

¶3 In June 2010, one-month-old M.B. was taken to the hospital with serious injuries, including several fractured bones, trauma to his head, bruising to his torso and head, severe rashes and a torn and exposed rectum. Evaluating physicians opined that M.B. was "clearly the victim of severe non-accidental trauma." M.B. died from his injuries, and the coroner determined that his death was a homicide caused by "blunt force trauma [to the] head." Father and M.B.'s biological mother (Mother) were arrested and charged with first-degree murder, child abuse, sexual assault of a minor and sexual conduct with a minor.

¶4 Following Father's arrest, ADES took custody of T.V. and filed a petition alleging T.V. to be dependent. At the preliminary protective hearing, Father admitted the need for a dependency due to his incarceration but denied the allegations in the dependency petition. The juvenile court found T.V. to be dependent, approved the case plan of severance and adoption and ordered ADES to file a motion to terminate Father's parental rights to T.V.[2]

[2] Mother's parental rights were also terminated. She is not a party to this appeal.

¶5 In July 2010, ADES filed a motion to terminate Father's parental rights to T.V., alleging that Father: (1) neglected or failed to protect a child from neglect pursuant to A.R.S. § 8-533.B.2; and (2) willfully abused or failed to protect a child from willful abuse so as to cause a substantial risk of harm to the child's health or welfare pursuant to A.R.S. §§ 8-201.2 (Supp. 2011) and 8-533.B.2. ADES also alleged that termination of Father's parental rights would be in T.V.'s best interest.

¶6 In August 2010, Father contested the termination and denied the allegations in the motion to terminate. Following mediation, however, the court noted that Father was "willing to sign consents and waivers for the adoption of [T.V.]." Nevertheless, the court also noted that Father did not agree to terminate his parental rights. As a result, the juvenile court conducted a trial on ADES's termination motion in December 2010.

¶7 At trial, Father testified that he pled guilty to felony child abuse of M.V. and that his parental rights were terminated because he neglected or abused M.V. or failed to protect her from neglect or abuse. Father also testified that termination of his parental rights was in T.V.'s best interest and that he was willing to sign away his parental rights on the condition that T.V. was not adopted by her maternal grandmother.

¶8 After testifying, Father signed a consent to adopt for T.V. The consent was notarized and admitted into evidence at the

severance trial. The juvenile court terminated Father's parental rights to T.V., finding that Father "knowingly, intelligently, and voluntarily executed a consent" to the adoption of T.V. and ADES proved by clear and convincing evidence that the termination was justified under A.R.S. § 8-533.B.2 and B.7. The court also found that termination was in T.V.'s best interest.

¶9 In January 2011, Father filed a timely notice of appeal of the termination order. On the same day, Father also filed a motion to set aside the order terminating his rights. The court denied the motion. Father then appealed the order denying his motion to set aside.

¶10 In motions to this court, Father's appellate counsel claimed Father was denied due process of law in the termination proceedings because of the ineffective assistance of his trial counsel. As a result, we suspended the appeal and remanded the matter to the juvenile court to conduct an evidentiary hearing on Father's ineffective assistance claim. The juvenile court scheduled an evidentiary hearing on June 30, 2011 before Judge Richard Weiss, who presided over the termination proceedings.

¶11 On June 29, 2011, Father filed a motion for change of judge for cause, claiming Judge Weiss's recent rulings in Father's criminal case "indicate[d] a bias and prejudice as to Judge Weiss presiding over this case and the hearing pending." Following an evidentiary hearing, Judge Lee Jantzen denied

Father's motion, determining that Judge Weiss's rulings did not show any personal bias against Father. Father did not appeal Judge Jantzen's order and the matter was returned to Judge Weiss.

¶12 In July 2011, the juvenile court conducted an evidentiary hearing on Father's ineffective assistance of counsel claim. Father argued trial counsel was ineffective by: (1) failing to object to ADES's exhibits and hearsay testimony; (2) failing to conduct an adequate investigation into the autopsy report and the manner of M.B.'s death; (3) failing to consult an independent medical examiner to review the evidence regarding M.B.'s death; (4) failing to obtain an independent medical expert to advance his theory of the case; (5) failing to object to ADES's proposed findings of fact; and (6) giving incorrect or inadequate legal advice regarding Father's consent to adoption and the burden of proof in a termination proceeding. Father argued that trial counsel's ineffective representation "resulted in the trial court making insufficient findings that grounds for termination existed under A.R.S. § 8-533(B)(2), abuse to a child." In response, ADES argued Father's consent to adoption was valid and, therefore, he could not demonstrate prejudice because grounds for termination existed under A.R.S. § 8-533.B.7. Father claimed, however, that his consent was invalid because he relied on his counsel's erroneous legal advice and inaccurate

promise that T.V. would be placed with the maternal grandmother when he signed the consent.[3]

¶13 Following the hearing, the juvenile court denied Father's motion, finding Father "has not sustained his burden that there were errors of counsel that were sufficient to undermine the confidence in the outcome of this matter." The court further found that "the proceedings were fundamentally fair and there is no indication of a reasonable probability of a different result." Father filed an amended notice of appeal to include the order denying relief based on his ineffective assistance claim.

¶14 We have jurisdiction pursuant to A.R.S. §§ 8-235.A (2007), 12-120.21.A.1 (2003) and 12-2101.A.1, 2 (Supp. 2011).

DISCUSSION

Standard of Review

¶15 On appeal, we presume the juvenile court made every finding necessary to support the order of termination, and if the court "fail[ed] to expressly make a necessary finding, we may examine the record to determine whether the facts support that implicit finding." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 17, 83 P.3d 43, 50 (App. 2004). Our review is

[3] We note that Father's testimony during the hearing on his ineffective assistance claim was inconsistent with his previous testimony that he did not want T.V. to be adopted by her maternal grandmother.

limited to whether any reasonable theory of the evidence could support the court's findings. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93-94, ¶ 4, 210 P.3d 1263, 1264-65 (App. 2009); *see also Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002) (noting that the juvenile court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings" (citation omitted)). Accordingly, we do not reweigh the evidence and "will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings." *Jesus M.*, 203 Ariz. at 280, ¶ 4, 53 P.3d at 205 (citations omitted).

Statutory Grounds for Termination

¶16 The juvenile court terminated Father's parental rights on the grounds of neglect and willful abuse under A.R.S. § 8-533.B.2 and consent to adoption under § 8-533.B.7. "If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds." *Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205 (citations omitted).

¶17 ADES alleged Father's rights should be terminated pursuant to § 8-533.B.2[4] because he was "unable to parent due to neglect due to the inability or unwillingness to protect [T.V.] from exposure to illegal drugs." In the motion, ADES referenced an incident in May 2010 during which Father admitted to smoking marijuana in front of T.V. and M.B. and police found drug paraphernalia in close proximity to the children. The court found ADES proved Father neglected T.V. on this ground by clear and convincing evidence. Father claims the court erred because "[s]moking marijuana in the presence of a two year old and one month old is not the sort of neglect which results in serious harm to a child." In other words, Father does not deny using drugs in close proximity to T.V. but argues, as a matter of law, doing so does not constitute neglect under § 8-533.B.2. We disagree.

¶18 "Neglect" is defined in relevant part as "[t]he inability or unwillingness . . . to provide [a] child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201.22(a). Contrary to Father's assertion, evidence of neglect need only demonstrate an "unreasonable risk of harm" to the child rather than "result[]

[4] Under § 8-533.B.2, the parent-child relationship may be terminated if "the parent has neglected or willfully abused a child."

in serious harm." Smoking marijuana in front of a child is not legally insufficient evidence to demonstrate an unreasonable risk of harm and, depending on the particular facts of a case, may be evidence of an "inability or unwillingness" to care for the child that "causes unreasonable risk of harm to the child's health or welfare." In addition, although the statutes dealing with termination do not address whether drug abuse constitutes evidence of neglect, the related statutes dealing with dependency proceedings specifically provide that "[i]n determining if a child is neglected, consideration shall be given to . . . [t]he drug or alcohol abuse of the child's parent, guardian or custodian." A.R.S. § 8-819.1 (2007); *see State v. Leonardo, ex rel. Cnty. of Pima*, 226 Ariz. 593, 595, ¶ 8, 250 P.3d 1222, 1224 (App. 2011) ("In interpreting a statute, we must construe it together with other statutes relating to the same subject matter."). Accordingly, we find the apparent disregard for a child's health and welfare in choosing to expose the child to illicit drugs and drug paraphernalia could create an unreasonable risk of harm to the child pursuant to § 8-533.B.2.

¶19 In this case, the record contains reasonable evidence to support the court's finding that Father neglected T.V. based on his involvement with using and selling illegal drugs. On May 25, 2010, police conducted a narcotics search of Father's residence. At that time, Mother told officers that Father used

drugs and sold them from the residence. Inside the residence, officers found drugs and drug paraphernalia, including: (1) two glass methamphetamine pipes, one with a usable amount of methamphetamine; (2) a marijuana pipe with burnt marijuana residue; (3) a "marijuana roach"; (4) pills; (5) syringes; (6) a pay/owe sheet documenting the sale of methamphetamine; and (7) a digital scale with methamphetamine residue. In the report, officers noted locating the "[d]rugs and drug paraphernalia in every room in the residence all of which [was] accessible by [the] children." On May 31, 2010, police responded a second time to Father's residence after receiving a report of an illegal transaction using a lost or stolen credit card. Officers documented a "strong odor of burnt marijuana" and observed a marijuana pipe in close proximity to T.V. Father later admitted to police that he smoked marijuana in front of his children. We find this evidence demonstrates Father's inability or unwillingness to adequately supervise T.V., thereby causing an unreasonable risk of harm to her health or welfare.

¶20 Furthermore, the record also contains substantial evidence that Father's drug use caused him to neglect M.B. During police questioning about M.B.'s death, Father admitted that he was "slamming dope" at the time M.B. might have been injured. Father acknowledged that he did not remember how M.B.'s injuries occurred because he was inebriated and further claimed

that he failed to take M.B. to a doctor or hospital because Father was "high on dope." The ADES case manager testified that Father's failure to seek medical treatment for M.B.'s injuries constituted neglect. This evidence was independently sufficient to allow the court to terminate Father's parental rights to T.V. because the neglect to M.B. occurred during the same time T.V. was in Father's care and custody. *See Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 79, ¶ 14, 117 P.3d 795, 798 (App. 2005) ("parents who abuse or neglect their children . . . can have their parental rights to their other children terminated even though there is no evidence that the other children were abused or neglected"); *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, 285, ¶ 16, 257 P.3d 1162, 1165 (App. 2011) (section 8–533.B.2 permits termination of parental rights to a child who has not been neglected if the parent abused or neglected another child and there is a "constitutional nexus" between the prior abuse and the risk of future abuse to a different child).

¶21 Reasonable evidence supports the juvenile court's finding that Father neglected T.V., and we therefore affirm the court's ruling that ADES proved a statutory ground for termination under § 8-533.B.2. Because we affirm the court's determination regarding § 8-533.B.2, we do not address Father's consent to adoption under § 8-533.B.7. *See Jesus M.*, 203 Ariz. at 280, ¶ 3, 53 P.3d at 205.

Best Interest Determination

¶22 To establish that termination of the parent-child relationship is in the child's best interest, the juvenile court must find either that the child will benefit from termination or be harmed by continuation of the relationship. *Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Factors to be considered in determining a child's best interest include whether: (1) an adoptive placement is immediately available; (2) any existing placement is meeting the needs of the child; and (3) the child is adoptable. *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379, ¶ 30, 231 P.3d 377, 383 (App. 2010).

¶23 In this case, ADES presented evidence that T.V. would benefit from termination and be harmed by continuing the parent-child relationship with Father.[5] As previously discussed, the record contains substantial evidence that Father neglected T.V. and M.B. and that the neglect created a reasonable risk to T.V.'s health and welfare. In addition, the ADES case manager opined

[5] Father also testified that the termination of his parental rights was in T.V.'s best interest. On appeal, Father argues we should disregard his trial testimony because, he alleges, he would not have so testified if his trial counsel had not given him inadequate or incorrect legal advice regarding the burden of proof as to T.V.'s best interest. At the hearing on his ineffective assistance claim, however, Father admitted that his trial testimony regarding T.V.'s best interest "was truthful." Nevertheless, because we affirm the juvenile court's finding that termination was in T.V.'s best interest irrespective of Father's testimony, we do not consider the testimony in our analysis.

that termination of Father's parental rights was in T.V.'s best interest due to Father's history of child abuse, child neglect and child endangerment. The case manager also testified that T.V. was adoptable, that her placement with her grandmother was meeting her needs and that adoptive placement with her grandmother was immediately available. Accordingly, we find reasonable evidence supports the juvenile court's finding that termination of Father's parental rights was in T.V.'s best interest.

Denial of the Motion to Set Aside

¶24 Although Father filed a timely notice of appeal from the juvenile court's order denying his motion to set aside the termination order, he does not raise any argument regarding that issue in his opening brief and acknowledges that the denial is "probably [] not an appealable decision" in his reply brief. Accordingly, he has waived any claims challenging that order on appeal. *See Childress Buick Co. v. O'Connell,* 198 Ariz. 454, 459, ¶ 29, 11 P.3d 413, 418 (App. 2000) ("issues not clearly raised in appellate briefs are deemed waived"); ARCAP 13(a)5 (appellant's brief shall contain "[a] statement of the issues presented for review"). In any event, because we affirm the termination order on its merits, we find the court did not abuse its discretion in denying the motion to set aside. *See Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101 ¶ 15, 158 P.3d

225, 230 (App. 2007) (reviewing the denial of a motion to set aside for an abuse of discretion).

Ineffective Assistance of Counsel

¶25 Next, Father argues the juvenile court erred by denying his motion for relief based on his claim of ineffective assistance of counsel. We assume, without deciding, that Arizona law permits relief in termination proceedings based on a claim of ineffective assistance of counsel. *See John M. v. Ariz. Dep't of Econ. Sec.,* 217 Ariz. 320, 323-24, ¶¶ 11-12, 173 P.3d 1021, 1024-25 (App. 2007). To successfully assert a separate claim for ineffective assistance, Father must establish that: (1) "counsel's representation fell below prevailing professional norms," *id.* at 323, ¶ 8, 173 P.3d at 1024; and (2) "counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different." *Id.* at 325, ¶ 18, 173 P.3d at 1026 (quoting *Strickland v. Washington,* 466 U.S. 668, 694 (1984)).

¶26 Here, Father claims his trial counsel's representation fell below the prevailing professional norms by: (1) failing to object to exhibits offered into evidence by ADES; (2) failing to conduct an adequate investigation into the details and nature of M.B.'s injuries and death; (3) giving Father incorrect or inadequate legal advice regarding the burden of proof in

termination proceedings, the legal effect of consenting to adopt, the requirement of reunification services and the requirement of a best interests finding; (4) failing to retain an independent medical expert to investigate M.B.'s injuries and death; and (5) failing to object to ADES's proposed findings of fact regarding M.V.

¶27 Assuming without deciding that trial counsel's representation fell below the prevailing professional norms, Father cannot establish prejudice. All of Father's arguments regarding ineffective assistance relate to the juvenile court's findings concerning abuse of M.B. or M.V. and his consent to adopt. Regarding neglect under § 8-533.B.2, however, Father simply argues that his conduct did not meet the statutory definition of neglect and he does not argue that trial counsel's performance affected the court's findings on that ground. Thus, because we affirm the juvenile court's findings pursuant to § 8-533.B.2 and Father does not claim trial counsel's performance affected those findings, we find Father has not established prejudice.

Motion for Change of Judge

¶28 Lastly, Father argues the superior court erred in denying his motion for change of judge for cause.[6] This court

[6] Although the superior court conducted an evidentiary hearing and issued an order denying Father's motion for change

reviews orders denying a motion for a change of judge for cause for an abuse of discretion. *State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997). To successfully assert a claim of judicial bias, Father must establish prejudice. *State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989); *State v. Thompson,* 150 Ariz. 554, 558, 724 P.2d 1223, 1227 (App. 1986).

¶29 Father filed the motion for change of judge in the course of proceedings on his claim of ineffective assistance. On appeal, he challenges only the order denying his motion for change of judge, in which he claimed Judge Weiss's rulings in Father's criminal trial demonstrated the judge's bias toward him and deprived him of fair and meaningful proceedings on his claim of ineffective assistance.[7] In the motion, Father did not claim

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of judge for cause, Father did not appeal that order. The State acknowledges, however, that this court has jurisdiction to consider Father's argument because the order denying Father's motion for change of judge was not a final appealable order. *See Pepsi-Cola Metro. Bottling Co. v. Romley*, 118 Ariz. 565, 568, 578 P.2d 994, 997 (App. 1978) (timely appeal from a final judgment may "properly place[] before [this court] the propriety of all prior non-appealable orders" (citation omitted)). Nevertheless, assuming we have jurisdiction to review the order, Father failed to raise a judicial bias issue in his second amended notice of appeal, in which he appealed the juvenile court order dismissing his ineffective assistance claim. Generally, issues not raised in the notice of appeal are deemed waived. *See Neal v. City of Kingman*, 169 Ariz. 133, 137, 817 P.2d 937, 941 (1991). However, we address the merits of Father's argument, in our discretion, because we affirm the juvenile court's order.

[7] All of the rulings Father cites as evidence of bias were made after Judge Weiss filed the order terminating Father's

that Judge Weiss was biased during the course of proceedings in his termination case, and on appeal, Father fails to point to any specific evidence arising during the termination case that demonstrates the judge's bias regarding those proceedings. *See Thompson*, 150 Ariz. at 558, 724 P.2d at 1227 (stating that the moving party has the burden of establishing bias by a preponderance of the evidence); *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) (noting that bias must arise from an extra-judicial source, not from the judge's actions in the case). Accordingly, we interpret Father's claim on appeal to be that he was prejudiced by judicial bias regarding only his claim of ineffective assistance.[8]

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parent-child relationship with T.V. Father cites no evidence in either the original motion for change of judge or in his appellate briefs that Judge Weiss demonstrated bias during any proceedings predating the filing of the termination order.

[8] To the extent Father intends to claim that Judge Weiss was biased during the termination proceedings, we find such argument to be waived because Father failed to raise it below, failed to adequately present the argument on appeal and failed to support the argument with evidence from the record. *See Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982) ("an appellate court cannot consider issues and theories not presented to the court below"); *Childress Buick Co.,* 198 Ariz. at 459, ¶ 29, 11 P.3d at 418 ("issues not clearly raised in appellate briefs are deemed waived"); *Brown v. U.S. Fid. & Guar. Co.,* 194 Ariz. 85, 93, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting assertions made without supporting argument or citation to authority); ARCAP 13(a)6 (appellant's brief shall contain arguments "with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

¶30 Even if we were to assume, without deciding, that Judge Weiss's rulings in the criminal case demonstrate bias toward Father that affected the proceedings on his ineffective assistance claim, because we affirm the termination order on statutory grounds for which Father did not assert an ineffective assistance argument, we find that Father could not have been prejudiced when the juvenile court denied him relief for ineffective assistance or when the superior court denied his motion for change of judge.

CONCLUSION

¶31 For the reasons set forth above, we affirm the order terminating Father's parent-child relationship with T.V and the order denying the motion to set aside the termination order.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PHILIP HALL, Judge

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JOHN C. GEMMILL, Judge