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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PAUL W., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and PAUL W., Appellees.	2 CA-JV 2010-0124 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J172104

Honorable Joan L. Wagener, Judge Pro Tempore

AFFIRMED

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E S P I N O S A, Judge.

¶1 Paul W. appeals from the juvenile court's October 2010 order terminating his parental rights to his son Paul W., also known as Paul Logan S.-W. (Logan), born in February 2008. Specifically, Paul challenges the court's findings that the Arizona Department of Economic Security (ADES) had made a diligent effort to reunify the family and that termination of his parental rights was in Logan's best interests. For the following reasons, we affirm.

Discussion

¶2 In a detailed ruling issued after a contested termination hearing, the juvenile court found ADES had shown by clear and convincing evidence that, despite its diligent effort to provide Paul with appropriate reunification services, he (1) suffered from a history of chronic, disabling substance abuse or mental illness that was likely to continue for a prolonged, indeterminate period, *see* A.R.S. § 8-533(B)(3); and (2) had been unable to remedy the circumstances that had caused Logan to be in court-ordered, out-of-home placement for more than fifteen months, and there was a substantial likelihood he would be unable to parent effectively in the near future, *see* A.R.S. § 8-533(B)(8)(c). As required, the court also found by a preponderance of the evidence that termination of Paul's parental rights was in Logan's best interests. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005) (statutory ground for termination requires clear and convincing evidence; best interests proven by preponderance).

¶3 "[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, and we will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of*

Econ. Sec., 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted). That is, we will not reverse a termination order for insufficient evidence unless, as a matter of law, no reasonable fact-finder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

Reunification Efforts

¶4 In order to terminate parental rights on grounds of chronic mental illness or substance abuse, or based on any time-in-care ground found in § 8-533(B)(8), ADES must establish that it made a "reasonable" or "diligent" effort to provide the family with appropriate reunification services. *See* § 8-533(B)(8) ("diligent effort" required by statute); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 33, 971 P.2d 1046, 1053 (App. 1999) (ADES must demonstrate "reasonable effort to preserve the family" before parental rights terminated on mental-illness ground); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 15, 83 P.3d 43, 49 (App. 2004) (same requirement for chronic-substance-abuse ground). ADES fulfills this duty by providing a father "with the time and opportunity to participate in programs designed to help [him] become an effective parent." *In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). But ADES is not required to provide a parent with every conceivable service or to ensure that he participates in every service offered. *Id.*

¶5 Paul does not dispute the juvenile court's finding that the Child Protective Services (CPS) division of ADES had provided him with numerous services during the course of the dependency proceeding, including random urinalysis; referrals to substance

abuse assessment, education, and treatment programs that provided individual counseling; a referral to Family Drug Court; a psychological evaluation; a parent-child relationship assessment; and education in parenting and anger management. Nor does he dispute the court's finding that, based on the results of random drug testing, he "continued to use marijuana during the majority of the dependency proceeding," even though he knew his case plan required him to refrain from using any illegal substances, alcohol, or non-prescribed medication.[1] Instead, he argues ADES failed to make a reasonable effort to reunify the family because he did not receive a psychological evaluation until April 2010, ten months after he first appeared in these proceedings.[2]

¶6 Addressing this delay in its ruling, the juvenile court wrote, "A psychological evaluation could not be completed until April 2010 because [Paul] could not demonstrate thirty (30) days of clean drug tests as required by the ADES policy." This finding was consistent with CPS case manager Heather Conroy's testimony that, as a matter of ADES policy, a parent must demonstrate "at least [thirty] days or some

[1]Since March 2009, Paul also had been using legally dispensed methadone, reportedly to address his addiction to previously prescribed pain medication.

[2]CPS had removed ten-month-old Logan from the care of his mother, Kira J., in December 2008, after receiving reports that Kira had neglected him, that Paul had been unable or unwilling to protect him from Kira's neglect, and that Kira and Paul both were using illegal substances and shared a history of domestic violence. Although Paul had been aware ADES had taken custody of Logan, CPS's attempts to contact him about the dependency proceedings were unsuccessful, as were attempts to effect personal service of a dependency petition. The petition eventually was served by publication, and Logan was adjudicated dependent in March 2009, after Paul had failed to appear in court. Paul did not contact CPS until May 2009, when he first expressed an interest in reunification; his first court appearance was in June 2009. Kira's parental rights to Logan have been terminated on grounds of relinquishment and length of time in care. *See* § 8-533(B)(7), (B)(8)(c). She is not a party to this appeal.

extended form of sobriety" before CPS will consider referring him for a psychological evaluation.

¶7 The juvenile court's finding also was consistent with Conroy's January 2010 report that, at that time, she would be consulting with a CPS psychologist about whether Paul would be required to participate in a psychological evaluation. Although Paul regularly had tested positive for marijuana use from June through mid-October 2009, Conroy had reported his test results during November and December 2009 were negative for illegal, non-prescribed substances. As Conroy explained, "Due to [Paul's] six[-]month absence in the [beginning of this] case as well as [his] continuing to test positive for marijuana up until approximately November 2009, a psychological evaluation has yet to be provided."[3] Paul completed psychological group testing in March 2010 and was evaluated by psychologist Michael German in April. Based on his own testimony at the termination hearing, he had started using marijuana again sometime in February or March 2010.

¶8 In his evaluation report, German opined that Paul suffered from active cannabis dependence and active opioid dependence, as well as a dependent personality disorder that was manifest in his relationship with Logan's mother, Kira J. He stated that "setting limits with [Kira] . . . . should be one of the main focuses of [Paul's] individual psychotherapy," along with addressing "[h]is lack of self-direction . . . [, his in]ability to

[3]In the same January 2010 report, Conroy had commended Paul for his recent sobriety and recommended that Logan's permanency planning hearing be continued to provide Paul with additional time to accomplish his case-plan goals. The juvenile court adopted this recommendation.

set limits . . . , [and] his substance dependence." After reviewing the evaluation with Paul, Conroy did not refer him to a new counselor for additional services, but recommended that he address his dependent relationship with Kira during his ongoing individual therapy. The juvenile court found Conroy's response to German's report consistent with the determination that ADES had made reasonable and diligent efforts to reunify the family, particularly "[g]iven the fact that a psychological evaluation identifying a dependent personality disorder as an issue was not completed until April 2010 due to [Paul's] inability to remain drug free for a mere thirty (30) days."

¶9 Paul does not directly challenge the juvenile court's findings regarding the timing of his psychological evaluation, but argues, for the first time on appeal, that ADES's policy requiring a parent to demonstrate sobriety before participating in a psychological evaluation violated his right to substantive due process. Relying on *Maricopa County No. JS-501904*, 180 Ariz. at 353, 884 P.2d at 239, he argues such a policy deprived him of the "'time and opportunity'" he needed to become an effective parent. He also relies on German's agreement, at the evidentiary hearing, that "'marijuana use, in and of itself, is not necessarily a barrier for successfully parenting a child'" to argue it was unreasonable for CPS to require Paul "to be sober with respect to marijuana use" before referring him for a psychological evaluation.

¶10 ADES maintains Paul failed to challenge the constitutionality of its policy at the termination hearing and therefore has waived appellate review of the issue. We agree. This court generally will not address a substantive-due-process claim raised for the first time on appeal, *see In re Commitment of Jaramillo*, 217 Ariz. 460, n.7, 176 P.3d

28, 33 n.7 (App. 2008), although we may do so in our discretion, *see Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008). Here, at the termination hearing, Paul not only failed to assert ADES's policy was unconstitutional, but failed to develop any evidence that might support such an argument. Thus, in addition to the sound policy supporting our determination of waiver, we would lack any basis, as a reviewing court, to consider his claim. *See Stokes v. Stokes*, 143 Ariz. 590, 592, 694 P.2d 1204, 1206 (App. 1984) (rule that "appealing party may not urge as grounds for reversal a theory which he failed to present below" intended to avoid prejudice to "party against whom the defense is newly asserted"; exceptions to rule recognized "only where . . . question is one of substantive law presenting no dispute as to the facts").[4] Our decision to decline review of this claim is buttressed by Paul's failure to develop any meaningful argument on appeal that his substantive due process rights have been violated. *See, e.g.*, *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 46, 81 P.3d 1016, 1028 (App. 2003) (to show substantive due process violation, claimant must establish abuse of governmental power "that 'shocks the conscience'"), *quoting United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 401 (3rd Cir. 2003); *see also* Ariz. R. Civ. App. P. 13(a)(6) (argument in opening brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to

[4]By way of illustration, Logan maintains on appeal, without citation to the record, that "the policy of requiring a period of sobriety prior to conducting a psychological evaluation is designed to ensure a proper psychological evaluation or diagnosis can be made, not to ensure effective parenting." Although Logan may be correct, and one of Conroy's reports hints as much, the record lacks any direct evidence that would inform a court's ruling on a substantive-due-process claim.

the authorities, statutes and parts of the record relied on"); Ariz. R. P. Juv. Ct. 106(A) (incorporating above provision for "appeals from final orders of the juvenile court"); *cf. State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to develop argument usually results in abandonment and waiver of issue).

¶11 To the extent Paul contends ADES's delay in conducting a psychological evaluation rendered its reunification efforts insufficient, we regard this argument as preserved by counsel's closing argument at the termination hearing. But, for the reasons clearly set forth in the juvenile court's ruling, we conclude sufficient evidence supported the determination that ADES had made reasonable, diligent efforts to reunify the family by providing Paul with appropriate services. We need not repeat that sound analysis here. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 16, 53 P.3d 203, 207-08 (App. 2002), *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

Best Interests

¶12 To establish that terminating Paul's parental rights was in Logan's best interests, ADES was required to show he "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004); *see also, e.g., In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6, 804 P.2d 730, 735 (1990) (to establish best interests, "petitioner might prove that there is a current adoptive plan for the child"). Paul first argues the juvenile court's finding was "premature" because ADES had not "provided the family with adequate services . . . or the opportunity to engage in

those services." Because we have found no error in the court's determination that ADES made sufficient reunification efforts to satisfy the standards found in § 8-533(B)(8) and *Mary Ellen C.*, we reject this argument.

¶13 Paul next argues the juvenile court's finding as to best interests, appearing at the end of its nine-page ruling, was conclusory, "rel[ied] on scant evidence," and erroneously found the evidence favored termination when "weighing two equally adequate options for Logan." We disagree.

¶14 Although the juvenile court did not expressly state the basis for its best-interests finding, facts in support of that finding are nonetheless set forth in the court's exhaustive ruling. *See In re Maricopa County Juv. Action No. JS-3594*, 133 Ariz. 582, 585, 653 P.2d 39, 42 (App. 1982) ("In reviewing the evidence, we are mindful of the fact that the [juvenile] court will be deemed to have made every finding necessary to support the judgment."). Specifically, the court found, and the record supports, that "Logan is in a foster home that is committed to adopting him. . . . [and] has provided [him] with structure and stability that has le[]d to major improvements in his behavior." In contrast, the evidence showed, and the court found, that at the time of termination, Paul was "in no better position to parent Logan now than at the beginning of this dependency action," and in some respects, was in a worse position, due to his lack of employment or stable, independent housing;[5] the recent impoundment of a vehicle, caused by his driving while

[5]At the time of the hearing, Paul was living with relatives who had not passed a CPS background check, in a home that, according to Conroy, "does not appear [to be] appropriate for an infant."

his driver license was suspended; and the potential revocation of his probation for nonpayment of fees. The evidence was not in equipoise, as Paul suggests, and the court did not err in finding termination of Paul's parental rights was in Logan's best interests.

Disposition

¶15 We affirm the juvenile court's October 19, 2010, order terminating Paul W.'s parental rights to his son, Logan.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge