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SEP 14 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| TERRANCE O.,<br><br>Appellant,<br><br>v.<br><br>ARIZONA DEPARTMENT OF ECONOMIC SECURITY and LAYAH G.,<br><br>Appellees. | 2 CA-JV 2011-0023<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 19191400

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

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Joan Spurney Caplan
Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Erin Devany
Mesa
Attorneys for Appellee Arizona Department of Economic Security

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E S P I N O S A, Judge.

**¶1** Terrance O., father of Layah G., born in April 2010, appeals from the juvenile court's March 2011 order terminating his parental rights on the ground that he substantially neglected or wilfully refused to remedy the circumstances that caused Layah, a child under the age of three years, to remain in court-ordered out-of-home care for six months or longer. *See* A.R.S. § 8-533(B)(8)(b). Terrance challenges the sufficiency of the evidence to support the order and the constitutionality of the statute. We affirm for the reasons set forth below.

**¶2** Before severing a parent's rights, the juvenile court must find clear and convincing evidence that at least one of the statutory grounds for termination exists and, by a preponderance of the evidence, that terminating the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 32, 41, 110 P.3d 1013, 1020, 1022 (2005). In reviewing a juvenile court's order terminating parental rights, we view the evidence and all reasonable inferences in the light most favorable to sustaining the court's ruling. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). We will not disturb the order if there is reasonable evidence in the record supporting the factual findings upon which it is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

**¶3** The record establishes that the Arizona Department of Economic Security (ADES) took custody of Layah two days after she was born in April 2010 because the parental rights of her mother, Teresita G., and Terrance to their other daughter Imani G.

had been terminated just three weeks earlier.[1] Imani had been taken to a local hospital in August 2009, when she was five months old, where it was determined she was the victim of shaken baby syndrome; she had a subdural hematoma, subarachnoid hemorrhaging, diffuse anoxic injury, and severe bilateral retinal bleeding. Teresita gave birth to Layah while incarcerated in the Pima County Adult Detention Center, awaiting trial on two counts of felony child abuse involving Imani.

**¶4** ADES alleged in the initial petition and in an amended petition that Teresita had physically abused Imani, seriously injuring her and that Terrance had not participated in services or cooperated with the case plan so that Imani could safely be returned to his custody. Consequently, ADES alleged, Layah was at risk for abuse or neglect and could not be placed in his care until he demonstrated he had benefitted from services designed to address the issues that had caused Imani to remain out of the home and resulted in the termination of his parental rights to her.

**¶5** The initial case plan goal with respect to Layah was reunification, and Terrance was provided a letter specifying the services ADES would provide and he was to obtain to facilitate that goal. Finding at the permanency hearing that Terrance had only minimally complied with the case plan, the court changed the case plan to severance and adoption. ADES filed a motion to terminate both parents' rights as the court directed, seeking termination of Terrance's rights based on length of time in out-of-home care,

[1]Terrance testified he did not attend the hearing on the termination of his rights to Imani because he was confused and went to the hearing on March 28, 2010, although it was held on March 24.

which is six months or longer for a child under the age of three years, § 8-533(B)(8)(b), and subsequently amending the motion to include mental illness, pursuant to § 8-533(B)(3).

**¶6** After a two-day hearing in January and February 2011, the court severed the parental rights of both parents. In a thorough, well-reasoned, seven-page minute entry, the juvenile court set forth the chronology of events that led to ADES's filing of the motion to terminate the parents' rights, and found there was insufficient evidence to terminate Terrance's rights on the ground of mental illness. But the court made detailed factual findings to support its conclusion that Layah had been out of the home pursuant to a court order for six months or longer and that Terrance had substantially neglected or wilfully refused to remedy the circumstances that caused the child to remain out of the home.

**¶7** On appeal, Terrance first contends there was insufficient evidence he had substantially neglected or wilfully refused to remedy the circumstances that caused Layah to remain out of the home pursuant to court order. He asserts, "[T]he Court erred in reaching this conclusion because he did make appreciable, good faith efforts to comply with the case plan, even though he had not completed [it] at the time of the contested severance [hearing] . . . ." He argues "his efforts were neither trivial nor de minim[i]s, as required by" the case law he cited regarding termination of a parent's rights pursuant to § 8-533(B)(8)(b). *See, e.g., In re Maricopa Cnty. Juv. Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994) ("[P]arents who make appreciable, good faith efforts to comply with remedial programs outlined by ADES will not be found to have

substantially neglected to remedy the circumstances that caused [the] out-of-home placement, even if they cannot completely overcome their difficulties.").

**¶8** As Terrance concedes, this court does not reweigh the evidence on appeal; rather, we defer to the juvenile court with respect to any factual findings because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). He asserts, however, he is not asking this court to reweigh the evidence but to consider whether the juvenile court used an incorrect standard in weighing the evidence, insisting the court used a standard that "was too high, in violation of his due process rights." He maintains the correct standard is "whether the reasonable person would have concluded as the trial court did," that the ground for terminating his rights was supported by clear and convincing evidence. (Emphasis omitted.) And, he insists, under that standard, the evidence fell short.

**¶9** But Terrance may be confusing this court's standard of review as a reviewing court with the standard the juvenile court must apply in assessing the evidence. In any event, in *Denise R. v. Arizona Department of Economic Security*, 221 Ariz. 92, ¶¶ 2-10, 210 P.3d 1263, 1264-66 (App. 2009), we determined the correct standard of review for an appellate court in a severance appeal, recognizing it had been stated in a variety of ways that included the interchangeable use of the terms "substantial," and "reasonable." We also discussed the juvenile court's assessment of the evidence. *Id.* We articulated our standard of review for statutory termination as follows: "We will review a

juvenile court's termination order in the light most favorable to sustaining the court's decision and will affirm it 'unless we must say as a matter of law that no one could reasonably find the evidence to be clear and convincing.'" *Id.* ¶ 10, *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955) (alteration in *Denise R.*).

**¶10** The juvenile court's obligation is to decide, after exercising its discretion to determine witnesses' credibility and weigh the evidence presented, whether the evidence establishes clearly and convincingly that at least one statutory ground for severing a parent's rights exists. *See id.* ¶¶ 2-10. Here, the court began its ruling with the following declaration: "After careful consideration of all the evidence, including the testimony of witnesses and their credibility and demeanor while testifying, the Court finds as follows by clear and convincing evidence." The court then correctly articulated the elements of § 8-533(B)(8)(b). The court applied the correct burden of proof to the elements of the statute and did not err.

**¶11** Nor can we say, as Terrance contends, that no reasonable juvenile court could have reached the conclusion the court reached here. He argues "he did make appreciable, good faith efforts to comply with the case plan," suggesting that in light of such evidence the court could not have found he had substantially neglected or wilfully refused to remedy the circumstances that caused Layah to remain out of the home. We disagree.

**¶12** No purpose would be served by repeating the court's order here in its entirety; rather, because the court's ruling is supported by the record and the applicable law, we adopt it. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08, *citing State v.*

*Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). To more specifically address Terrance's arguments, however, we note relevant portions of that ruling and portions of the record supporting it. The court acknowledged, for example, the efforts Terrance had made and identified aspects of the case plan with which he had complied, even if only partially. From its minute entry it is clear the court weighed all of these factors and did not believe, as Terrance suggests, that unless a parent completely complies with every aspect of the case plan the parent will be regarded as having substantially neglected or wilfully refused to remedy the circumstances that caused the child to remain out of the home.

**¶13** The juvenile court made clear it considered all of the relevant circumstances, including the fact that Terrance had failed to comply with a similar case plan with respect to Imani, resulting in the termination of his rights to her on the same ground. The court found significant that Terrance was aware of the short time period within which he was required to provide a safe, stable environment, having been so informed by the Child Protective Services case manager and, as the court pointed out in its order and as Terrance admitted at the severance hearing, by the court at the preliminary protective hearing. That he fully comprehended this was equally clear; not only was he told repeatedly, but Dr. Jill Plevell evaluated him and concluded he was extremely intelligent.

**¶14** The court was correct that a parent must actively participate in the services ADES provides or recommends and cannot passively wait for ADES to make all of the

arrangements for the services and literally place the services in a parent's lap. Rather, the parent has a responsibility to do what is necessary to avail him or herself of services ADES offers, thereby demonstrating a commitment to doing what must to be done to regain custody of a child. Moreover, the case manager testified about the numerous things she did to afford Terrance access to various services designed to reunify him with Layah, including assisting him in getting health insurance coverage through the Arizona Health Care Cost Containment System. She testified he had not engaged in individual therapy; finished parenting classes (acknowledging the services did not become available to him until just a few weeks before the severance hearing); found stable, independent housing (instead living with his sister); or attended all scheduled visitations with Layah (and turning down the opportunity for extra visitation). Terrance conceded at the hearing that he "probably ha[d]n't been as diligent" as he should have been. When he was reminded at the hearing that he had been told at the April 28, 2010, preliminary protective hearing that he had six months to participate in the case plan and remedy the circumstances that caused Layah to be taken into ADES custody and was asked what had taken him so long to "get motivated in this case," he responded, "I don't know, really, I really don't know."

**¶15** The court noted with specificity the numerous instances in which Terrance had failed to follow through with tasks and take the initiative, consequently failing to participate in or complete certain services and delaying others. It found "his excuses and his failure to follow thorough lack[ed] credibility," adding, "[h]e has procrastinated on pretty much every aspect of his case plan." To the extent there were conflicts in the evidence in this regard, it was for the juvenile court, not this court, to resolve. *See Jesus*

*M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. Viewed in the light most favorable to sustaining the court's order, there was ample evidence to support the finding, at the very least, that Terrance had substantially neglected to remedy the circumstances that caused Layah to remain out of the home.

**¶16** Terrance also challenges the constitutionality of § 8-533(B)(8)(b). We agree with ADES that although Terrance framed the issue in the heading of this section as a claim that the statute is unconstitutionally vague, ambiguous, and overbroad, the only argument he makes is that the statute is vague. He has therefore abandoned the remaining bases for challenging the statute's constitutionality. *See* Ariz. R. Civ. App. P. 13(a); Ariz. R. P. Juv. Ct. 106(A) (specifying Rule 13, Ariz. R. Civ. App. P., generally "appl[ies] in appeals from final orders of the juvenile court").

**¶17** In any event, Terrance did not challenge the constitutionality of the statute before the juvenile court. The failure to raise a claim in the juvenile court usually waives that claim on appeal. *See Christy C.*, 214 Ariz. 445, ¶ 21, 153 P.3d at 1081 ("We generally do not consider [claims] raised for the first time on appeal."). This includes a challenge as to the constitutionality of a statute. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997) (appellate court "generally [does] not consider arguments, including ones concerning constitutional issues, raised for the first time on appeal"). Although we may, in our discretion, overlook a party's failure to raise such a claim below, *see Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008), we see no reason to address the issue here.

**¶18** We note, too, that in the heading of this section Terrance contends the application of the statute to him resulted in fundamental error. In the criminal law

context, error that can be characterized as both fundamental and prejudicial can be addressed on appeal despite the defendant's failure to preserve the issue for appellate review by asserting it in the trial court. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Not only has Terrance failed to argue that this principle applies in juvenile cases,[2] he did not mention the term "fundamental error" in the body of his argument; and he used the term "fundamental" only in characterizing the nature of his rights, referring to fundamental parenting rights and fundamental due process rights. He did not argue that a waived claim can be addressed based on the fundamental error principle and that we should do so here. We therefore will not address the waived claim under a fundamental error standard of review.

**¶19** The juvenile court's order terminating Terrance's parental rights is affirmed.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[2]The principle has been applied in a severance appeal by Division One of this court. *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005). *But see Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) ("The doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations . . . [that] deprive[] a party of a constitutional right.").