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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSEPH B., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and JOSEPH B. JR., Appellees.	2 CA-JV 2011-0047 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18974300

Honorable Sarah R. Simmons, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Joseph B. appeals from the juvenile court's ruling terminating his parental rights to his son, Joseph B. Jr., born in May 2002, pursuant to A.R.S. § 8-533(B)(2), (3) and (8)(c).[1] He asserts the juvenile court erred in finding termination was in Joseph Jr.'s best interests, and failed to make a required finding that the Arizona Department of Economic Security (ADES) had made diligent efforts to provide appropriate reunification services as required by § 8-533(B)(8). He additionally contends the procedures outlined in A.R.S. § 8-862 and utilized in his case violated his constitutional right to due process.

¶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 a preponderance of evidence that termination of the parent's rights is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). "[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).

¶3 After a contested severance hearing, the juvenile court terminated Joseph's parental rights pursuant to § 8-533(B)(2) and (B)(3) based on his sexual abuse of his daughter, his having provided his daughter with marijuana, and his chronic use of

[1]The juvenile court also severed the parental rights of Joseph Jr.'s mother, Anna B., but she is not a party to this appeal.

marijuana, including use in Joseph Jr.'s presence. The court also terminated Joseph's rights on time-in-care grounds pursuant to § 8-533(B)(8)(c). Joseph does not contest these findings on appeal, arguing only that the court erred in finding termination would be in Joseph Jr.'s best interests.

¶4 Relevant to its best-interests finding, the juvenile court determined Joseph Jr. had been in the care of his paternal grandmother, JoAnn K., since his removal, had lived with her "virtually all his life," and was close to his sister, who also lived with JoAnn. The court also noted that Child Protective Services (CPS) case manager Francisco Rendon had testified it would be detrimental to Joseph Jr. to separate him from his sister, he "was doing well in that environment, and [JoAnn] is meeting [his] needs." Finally, the court observed, although JoAnn would like to adopt Joseph Jr., even if she is unable to, he is "an adoptable child." These findings amply support a conclusion that termination of Joseph's parental rights was in Joseph Jr.'s best interests. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004) (evidence child adoptable and current placement meeting child's needs sufficient to find termination in child's best interests); *James S. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 351, ¶ 19, 972 P.2d 684, 689 (App. 1998) (fact child placed in adoptive home with sibling and is bonded with sibling relevant to best-interests determination).

¶5 Joseph contends, however, the findings do not justify the juvenile court's conclusion, reasoning that its best-interests finding was based largely on its determination that JoAnn would be a suitable adoptive parent for Joseph and asserting the evidence does not support that conclusion. He complains that, while Joseph Jr. lived at JoAnn's with his parents, JoAnn had failed to protect his sister from sexual abuse or either child from Joseph's marijuana abuse and concludes, therefore, that "it cannot be in [Joseph

Jr.'s] best interest to be adopted by [her.]" The court addressed these concerns in its ruling, noting that JoAnn "has learned a lot during the course of this case, and she would be able to protect Joseph from harmful situations."

¶6 Joseph identifies evidence contradicting the juvenile court's conclusion, specifically testimony by Sherri Mikels-Romero, a psychotherapist who had provided services to Joseph Jr.'s mother. Mikels-Romero opined that JoAnn would not be able to protect Joseph Jr. because she had previously permitted unsupervised contact between Joseph and Joseph Jr. despite contrary advice from CPS.[2] But there is nothing in the record suggesting Mikels-Romero met with JoAnn or evaluated her conduct or parenting skills in any meaningful way. And she acknowledged that JoAnn's demand that Joseph leave her home when JoAnn learned of the abuse allegations was a "good sign," although she still had concerns about JoAnn's "ability to protect."

¶7 Additionally, although Joseph characterizes Mikels-Romero's testimony as "uncontroverted," he is mistaken. Rendon testified that, although he initially had concerns about JoAnn's parenting ability, after "getting to know JoAnn," and having "numerous long conversations" with her, he felt she would be protective of Joseph and his sister, she "understood the severity of the situation, and she knew where to get help and services." It is the juvenile court's role to evaluate and weigh conflicting evidence; we will not reweigh the evidence on appeal. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004) (juvenile court "in the best position to

[2]Although Joseph suggests the juvenile court failed to consider this testimony, we presume the court considered the evidence presented. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004).

weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts").

¶8 And, even assuming the juvenile court erred in concluding termination was in Joseph Jr.'s best interests because he could remain in JoAnn's care, it also concluded Joseph Jr. was otherwise adoptable. Joseph urges, however, that if Joseph Jr. should not be separated from his sister and JoAnn, then adoption by someone other than JoAnn could not be in his best interests. We do not find this reasoning convincing. First, Rendon expressly testified that Joseph Jr. could be adopted by someone other than JoAnn. And, although the court concluded that placement with JoAnn would be ideal based on the evidence before it, that does not foreclose a conclusion that Joseph Jr. was otherwise adoptable and, in general, that he would benefit from being separated from his abusive parent.

¶9 Joseph is correct that the juvenile court did not expressly find that Joseph Jr. would be harmed if his parental rights were not severed, but the court noted JoAnn would be able to protect Joseph Jr. from "harmful situations"—like those caused by Joseph's conduct. The presence of a statutory ground for termination typically "will have a negative effect on the children"; the presence of such a ground here therefore supported the juvenile court's best-interests finding. *In re Maricopa Cnty. Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988). For these reasons, we find no error in the court's determination that termination of Joseph's parental rights was in Joseph Jr.'s best interests.

¶10 Joseph next argues the juvenile court's signed order terminating his parental rights failed to comply with the specificity requirements of A.R.S. § 8-538(A) and Rule 66(F), Ariz. R. P. Juv. Ct., because it did not expressly address ADES's burden

to show diligent effort to provide appropriate reunification services pursuant to § 8-533(B)(8). He acknowledges that, by failing to raise this argument below, he has waived it pursuant to this court's decision in *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007). Joseph, however, urges us not to follow the holding in *Christy C.* and attempts to distinguish the authority relied on in that decision. He asserts that requiring counsel to request specific findings against the parent would improperly "require that attorney to act in direct conflict with his or her client's wishes and legal interests."

¶11 The juvenile court's ruling here arguably falls short of compliance with § 8-538(A) and Rule 66(F)(2)(a) because, although it enumerates the services provided to Joseph, it does not contain an express finding that ADES had been diligent in providing those services. But we are not persuaded that counsel's having requested more detailed findings would have impaired Joseph's position on appeal. Nor do we find any sound policy reason to permit counsel to ignore error that readily may be corrected by the juvenile court in order to strengthen an appeal; Joseph identifies no area of the law where such a procedure is accepted. *Cf. State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (adopting policy of "discourag[ing] a defendant from 'tak[ing] his chances on a favorable verdict, reserving the 'hole card' of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal."), *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (second, third, and fourth alterations in *Henderson*). Indeed, counsel's timely raising of the issue may prompt a court to conclude a particular element has not been satisfactorily proven and severance is thus unwarranted.

¶12 In any event, as the court in *Christy C.* noted, even if the juvenile court's findings were insufficient, "any error would have been harmless, and remand not required." 214 Ariz. 445, n.5, 153 P.3d at 1081 n.5. We reach the same conclusion here. As noted above, the court's ruling detailed the services offered to Joseph and noted his refusal to participate in some of those services. Joseph does not assert the offered services were insufficient, and no reasonable fact-finder could conclude ADES was not sufficiently diligent in providing appropriate services.[3]

¶13 Finally, Joseph asserts the procedure outlined in § 8-862[4] and followed in this matter violated his right to procedural due process and is therefore unconstitutional. He asserts that, once a juvenile court orders ADES to file a motion for termination at a permanency hearing in the course of a dependency matter pursuant to § 8-862(D)(1), the

[3]Subsections (B)(2) and (3) of § 8-533 do not expressly require ADES to demonstrate it provided appropriate reunification services. But this court has held that, although § 8-533(B)(3) contains no express requirement, as a constitutional matter the state must "make reasonable efforts to preserve the family" or establish that such efforts would be futile before a parent's rights are terminated. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 30, 32, 34, 971 P.2d 1046, 1052-53 (App. 1999). For the purposes of this discussion, we will assume without deciding that the same reasoning applies to § 8-533(B)(2), and that the juvenile court is required to make such findings in its order.

[4]The legislature enacted § 8-862 in 1997 in an effort to "accelerate the process by which parental rights are terminated so that children can be adopted more readily and at an earlier age." *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶¶ 16-17 & ¶ 16, 38 P.3d 41, 43-44 & 44 (App. 2002); 1997 Ariz. Sess. Laws, ch. 222, § 52; *see also Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 5, 1 P.3d 155, 156-57 (App. 2000) (section 8-862 adopted to enable timely permanency proceedings). In brief, that statute requires the juvenile court to determine, at a permanency hearing, whether termination of parental rights is in the best interests of the child and, if so, to order the state or the child's attorney or guardian ad litem to file a motion to terminate parental rights. § 8-862(B)(1), (D)(1).

court is unable to act as "an impartial decision-maker," resulting in a proceeding that lacks any "appearance of fundamental fairness." Joseph claims, "Having already determined that Appellant's parental rights *should* be terminated, it would be naive to believe that the Juvenile Court could or would fairly and impartially determine whether legal grounds existed to support its determination." He generally asserts that, after the court has made preliminary findings that termination is in the child's best interests, the subsequent trial is "purely nominal" because the court has already determined the outcome, thereby violating the parent's due process rights. Joseph thus asks that we declare § 8-862 unconstitutional and vacate the order terminating his parental rights to Joseph Jr.

¶14 But Joseph did not challenge the constitutionality of § 8-862 at the termination hearing and therefore has waived appellate review of this issue. *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, consider a constitutional argument raised only on appeal, *see Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1140 (App. 2008), we decline to do so here. Merely asserting a due process challenge does not necessarily ensure we will consider the argument. *See In re Pima Cnty. Mental Health No. MH 1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993) (declining to consider due process claims raised for first time on appeal where not compelling and facially lacking merit).

¶15 Here, Joseph not only failed to assert § 8-862 was facially unconstitutional at the termination hearing, but also failed to develop any evidence that the juvenile court had acted with the bias he argues is inevitable under the statutory scheme. Thus, in

addition to the policy supporting waiver, the record is devoid of any evidence of bias by the juvenile court.[5] *See Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 212 Ariz. 351, ¶ 24, 132 P.3d 290, 296 (App. 2006) (judges entitled to presumption of "'honesty and integrity'"), *quoting Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, ¶ 24, 985 P.2d 633, 639 (App. 1999). The court conducted a permanency hearing and at least two dependency reviews and waited until Joseph Jr. had been removed from his parents' care for nearly two years before it changed the case plan goal to severance and adoption and ordered ADES to file a motion to terminate. At that point ADES, not the court, decided which grounds to allege in the motion. *See* § 8-862(D)(1).

¶16 Moreover, as we have previously found, orders entered after a permanency hearing are not final and appealable specifically because they "contemplate further proceedings that will determine the ultimate outcome of the case," which remains uncertain until the proceedings are concluded. *Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, ¶ 8, 1 P.3d 155, 158 (App. 2000). This is precisely what happened here; after the juvenile court ordered ADES to file a motion to terminate, ADES had the burden of proving the grounds asserted in the motion. *See* § 8-862(D)(1). And only after hearing the evidence presented did the court reaffirm its earlier best interests finding.

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[5]For this reason, we reject Joseph's argument that the alleged due process violation here constituted prejudicial, fundamental error, even assuming such review is appropriate. *Cf. Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (applying fundamental-error doctrine to termination of parental rights); *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (review for fundamental error "sparingly applied in civil cases and may be limited to situations . . . [that] deprive[] a party of a constitutional right"). Joseph's speculative claim of bias is insufficient to demonstrate prejudice. *See Monica C.*, 211 Ariz. 89, ¶ 25, 118 P.3d at 43 ("[T]here must be prejudice involved in fundamental error to justify relief.").

¶17 For the reasons stated, the juvenile court's order terminating Joseph's parental rights to Joseph Jr. 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