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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT P. SR., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and ROBERT P. JR., Appellees.	2 CA-JV 2011-0056 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J17256500

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin
Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Michael F. Valenzuela
Phoenix
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E S P I N O S A, Judge.

¶1 Robert P. Sr. appeals from the juvenile court's ruling terminating his parental rights to his son, Robert P. Jr., born in January 2010, based on neglect or abuse, mental illness, and time in court-ordered, out-of-home care. *See* A.R.S. § 8-533(B)(2), (3), (8)(a). Robert argues his substantive due process rights were violated, the state had not made "a good faith effort to preserve the family," and sufficient evidence did not support the grounds for termination. We affirm.

¶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 Following Robert Jr.'s birth in January 2010, Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), removed him from the custody of his mother, Julie S., and Robert after hospital staff informed CPS

that Julie's behavior had been unstable and opined that the child would not be safe with his parents. He was ultimately placed with his paternal aunt.

¶4 In March 2010, Robert Jr. was adjudicated dependent as to Robert after Robert admitted his "mental health had not been well-managed, significantly impacting his ability to maintain his own safety and that of the newborn." He also admitted he had a history of substance abuse, had been in prison in the past for child abuse and other violent crimes, and had lost his parental rights to three other children in Arizona, one of whom he had physically abused, causing "immersion burns and broken bones."[1] Robert later maintained, however, that it was his previous wife—not him—who had abused his children, and that he had taken the blame to prevent her from going to prison. Robert began participating in various reunification services, including domestic-violence counseling, anger-management classes, and individual counseling.

¶5 In June 2010, Dr. Ralph Wetmore, a licensed psychologist, evaluated Robert, diagnosing him with an antisocial personality disorder with histrionic and narcissistic features. Wetmore noted that Robert could "be rather deceitful at times," and that the results of several psychological tests were inconclusive due to Robert's "elevated lie scores." Wetmore opined that, based on Robert's past conduct, there were continued "serious and significant concerns regarding [Robert's] ability to care for a child." He specifically noted Robert's "extremely dysfunctional, destructive, and abusive"

[1]The record also shows Robert abandoned a fourth child in Ohio after Ohio Child Protective Services had taken custody. Additionally, the record shows an extensive pattern of domestic violence between Robert and Julia.

relationship with Julia and opined that "the risks" and "probability of potential abuse and/or neglect [of Robert, Jr. were] high."

¶6 Although Robert ultimately ended his relationship with Julia, he began another relationship with M., who—like Julia—was seriously mentally ill. CPS also had an open dependency case involving M. and her son in which family reunification was believed to be unlikely. Despite being told of CPS's concerns about that relationship and how it reflected on his decision-making skills, Robert nonetheless continued to see M.; his probation officer later reported to CPS that M. had been staying in Robert's home in violation of the terms of his probation.

¶7 A December 2010 report prepared by Robert's CPS case manager recommended that the juvenile court change Robert's case plan to severance and adoption. The report noted that Robert's relationship with M., "someone who also exhibited unsafe parenting," constituted poor decision making; that Robert "does not take responsibility for his abusive or neglectful actions in the past;" and that he has been unable to "fully explain how he [has] benefitted from services." ADES then filed a motion to terminate Robert's and Julia's parental rights to Robert Jr. The petition alleged that termination was warranted on the grounds of neglect and abuse, mental illness, and Robert Jr.'s out-of-home placement for nine months or longer.

¶8 After a five-day contested severance hearing, the juvenile court found termination warranted on all three grounds alleged and in Robert Jr.'s best interests.[2] At

[2]The juvenile court also terminated Julia's parental rights to Robert Jr., but she is not a party to this appeal.

that hearing, Robert's therapist, domestic-violence counselor, and parent aide all opined that he had made progress during his participation in services, but each noted concerns about Robert's relationship with M. Despite stating that Robert had made "substantial progress," therapist Robert Classen acknowledged Robert was only "in the process" of learning to make good decisions about relationships. And Robert's parent aide said that, although Robert had made "some progress," he had made less than he should have because he had missed visits with his son. She also noted Robert frequently had been dishonest. Robert's case manager opined that Robert had not demonstrated he could safely parent Robert Jr., based primarily on his previous violent criminal history and his abuse and neglect of his other children, as well as his failure to take responsibility for that conduct. She observed that his relationship with M. was also a barrier to reunification, and that it was an indicator Robert had not made significant progress in his therapy despite the fact that he had "verbalized progress to his therapist in terms of relationships." Finally, she stated that termination was in Robert Jr.'s best interests, he was adoptable, and his paternal aunt was willing to adopt him.

¶9 During his testimony, Wetmore reiterated the findings in his psychological evaluation of Robert, further explaining that individuals with antisocial personality disorder tend to have trouble with the law, are prone to lie, and may be impulsive and aggressive. He stated that Robert's condition can interfere with a parent's ability to safely and appropriately care for a child and was likely to continue for a prolonged and indeterminate period of time. He observed that children who live with an adult with antisocial personality disorder "run [a] higher risk of being abused." Wetmore also stated

he would be concerned, given Robert's relationship history, if Robert had entered a relationship with a woman with a serious mental illness and an ongoing CPS case concerning her own child.

¶10 Robert first argues his substantive due process rights were violated. But his arguments are, at their core, assertions that the juvenile court erred by considering certain evidence and failing to give other evidence sufficient weight. Specifically, he contends the court erred by considering his previous convictions for child abuse and a psychological evaluation "performed a year prior to trial that was never updated." He also maintains the court failed to consider the testimony of his "therapist and domestic violence group facilitator," and "ignored" his recent efforts to meet his case plan goals as well as the fact that his case plan had not been updated and revised. We question whether these claims, even if meritorious, may properly be characterized as a violation of substantive due process. *See Martin v. Reinstein*, 195 Ariz. 293, ¶ 66, 987 P.2d 779 (App. 1999) (substantive due process "prevents the government from engaging in arbitrary, wrongful actions" irrespective of procedural fairness and "precludes conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty'"), *quoting United States v. Salerno*, 481 U.S. 739, 746 (1987). Moreover, to the extent Robert argues his claims are grounded in substantive due process, he has waived that argument by failing to raise it below, and we decline to address it further.[3] *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008).

[3]Robert asserts that a claim based on substantive due process cannot be waived, relying on authority from the Tenth Circuit Court of Appeals. But the cases he cites are

¶11 Robert also asserts the juvenile court erred by finding termination was warranted based on § 8-533(B)(3), which, as relevant here, provides for termination when a parent is unable to discharge his or her parental responsibilities due to mental illness, "and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." Robert argues that the court improperly relied on a psychological evaluation that had been performed a year before the severance hearings and disregarded testimony by Robert's therapist that he had made substantial progress. In essence, Robert asks us to reweigh the evidence on review. We will not do so and instead defer to the juvenile court's findings if supported by substantial evidence. *See Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005).

¶12 Robert cites no authority suggesting the juvenile court erred by relying on Wetmore's psychological evaluation. Nor does he identify evidence in the record suggesting that evaluation was no longer accurate. Although Classen testified Robert had made progress in his therapy, he did not testify that Robert had resolved the issues identified in Wetmore's evaluation. And Classen stated—as did Robert's domestic-violence counselor, his parent aide, and his case manager—that his continuing

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inapposite, as they involve the prohibition against trial of a mentally incompetent criminal defendant. *See Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999); *Castro v. Ward*, 138 F.3d 810, 817 (10th Cir. 1998); *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997). Moreover, in the civil context, the United States Supreme Court consistently has declined to address substantive due process claims not previously raised. *See Yee v. City of Escondido, California*, 503 U.S. 519, 533-34 (1992); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 & n.23 (1989).

relationship with M. was problematic. Robert's case manager opined Robert's new relationship with M. demonstrated he still needed to make progress before he could effectively parent Robert Jr. Based on this evidence, we cannot say the court erred in finding that Robert's mental illness prevents him from effectively parenting his son and that such condition is likely to persist. *See* § 8-533(B)(3).

¶13 Robert additionally contends ADES failed to provide adequate services to remedy his mental illness, arguing that the Americans with Disabilities Act (ADA)[4] required ADES to provide "a psychiatric evaluation and therapy focused on the specifically diagnosed mental illness in addition to the general therapy he was offered." Robert did not argue below that the ADA required ADES to provide a different type or greater quantum of services than those offered. Accordingly, we do not address this argument on appeal. *See Kimu P.*, 218 Ariz. 39, n.3, 178 P.3d at 516 n.3.

¶14 To the extent Robert suggests the services provided were otherwise inadequate,[5] he has waived that argument on appeal. He cites no evidence in the record that other services would have been beneficial and no authority suggesting they were required. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); Ariz. R. P. Juv. Ct. 106(A)

[4]42 U.S.C. §§ 12101-12213.

[5]Subsection (B)(3) of § 8-533 does not expressly require ADES to demonstrate it provided appropriate services. But this court nevertheless has held 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).

(incorporating above provision for "appeals from final orders of the juvenile court"); *Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶15 Because we conclude sufficient evidence supports the juvenile court's finding that termination was warranted pursuant to § 8-533(B)(3), we need not address the other grounds of termination found by the court, nor Robert's arguments related to those grounds. *See Jesus M. v. Ariz. Dep't Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002).

¶16 For the reasons stated, the juvenile court's order terminating Robert's parental rights to Robert 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