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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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BIANCA B., *Appellant*,

*v.*

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, K.M., *Appellees*.

No. 1 CA-JV 13-0156  
FILED 12-10-2013

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Appeal from the Superior Court in Maricopa County  
No. JD11816  
The Honorable Connie Contes, Judge

**AFFIRMED**

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COUNSEL

David W. Bell, Attorney at Law, Mesa  
By David W. Bell

*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Nicholas Chapman-Hushek

*Counsel for Appellee, ADES*

**MEMORANDUM DECISION**

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

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**K E S S L E R**, Judge:

¶1 Mother appeals from the juvenile court's order terminating her parental rights to her minor child, K.M. For the following reasons, we affirm.

**BACKGROUND**

¶2 Mother gave birth to K.M on September 30, 2010 while incarcerated. Mother admittedly used phencyclidine ("PCP") during pregnancy. K.M. has cerebral palsy, which his physician opined was the result of intrauterine drug exposure. Consequently, K.M. needs special occupational, feeding, and speech therapies.

¶3 In February 2011, the juvenile court adjudicated K.M. dependent as to Mother based on Mother's substance abuse, and ordered K.M. into the care of an out-of-home placement. During this dependency, Mother participated in reunification services offered by the Arizona Department of Economic Security ("ADES"), including TERROS Families F.I.R.S.T. substance abuse treatment, parental aid through Family House, and substance abuse treatment through Native American Connections. Additionally, Mother attended K.M.'s therapies and learned about his special needs.

¶4 Mother felt that she received all the services she needed for successful reunification during the first dependency. The juvenile court returned K.M. to Mother's physical custody in January 2012 and in February dismissed the dependency, thereby restoring legal custody of K.M. to Mother.

¶5 In May 2012, ADES received reports alleging that Mother was neglecting K.M. Specifically, the report indicated that K.M. lost weight, appeared weak, and was not progressing with his balance. Additionally, Mother reportedly was no longer living with K.M.'s maternal grandmother ("Grandmother"), currently was living in a shelter, and concerns arose that Mother again was abusing drugs.

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¶6 In June 2012, K.M. was admitted to Phoenix Children’s Hospital because of his weight loss. K.M. quickly regained weight after physicians placed him on what was supposed to be his normal home feeding regimen. Thus, K.M.’s physician diagnosed him with “failure to thrive,” and noted “significant concerns of this being social failure to thrive with improper nutrition being provided by [Mother].” It also was reported that Mother appeared to be under the influence during K.M.’s hospitalization. Specifically, Mother was observed grinding her teeth and rubbing her nose, and was unable to maintain a conversation about K.M.’s treatment.

¶7 Consequently, ADES filed a second dependency petition in June 2012. The juvenile court placed K.M. in the physical and legal custody of ADES, and again adjudicated K.M. dependent as to Mother. The case plan at that time was “Family Reunification concurrent with Severance and Adoption.”

¶8 According to Child Protective Services case manager Lauren Brown (“Brown”), Mother was asked immediately to go to TASC and TERROS. ADES made arrangements with TASC, but similar arrangements were not made with TERROS until September 2012 because ADES was unable to locate or contact Mother. Although Mother left voicemails with ADES several times during that period, she did not leave a call back number until August.

¶9 Once she established contact, Brown personally discussed services with Mother and asked her to participate in random urinalyses (“UA’s”). Since August 2012, Mother completed one out of twenty-one scheduled UA’s, which returned positive for PCP. A second test was attempted, but Mother reportedly sent another individual to test for her, so the sample was voided once it was determined that Mother was not the person who provided it.

¶10 In October 2012, ADES petitioned to terminate Mother’s parental rights to K.M. ADES proceeded with termination based on a prior dependency within the last eighteen months pursuant to Arizona Revised Statutes (“A.R.S.”) section 8-533(B)(11) (Supp. 2013).<sup>1</sup> During the contested severance hearing, Brown opined that Mother was unable to effectively implement knowledge of K.M.’s therapies and specialized care,

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<sup>1</sup> We cite to the current versions of statutes unless they have been materially changed since the proceedings below.

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and that Mother had not demonstrated the stability or willingness to provide K.M. with proper care.

¶11 The juvenile court found that: (1) K.M. was cared for in an out-of-home placement pursuant to court order, (2) ADES made diligent efforts to provide appropriate reunification services, (3) K.M. was returned to the legal custody of Mother pursuant to court order, and (4) within eighteen months after K.M. was returned to Mother, K.M. again was removed from Mother's physical and legal custody, and Mother currently is unable to discharge her parental responsibilities. The juvenile court also found that severance served K.M.'s best interests, and therefore terminated Mother's parental rights.

¶12 Mother timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2013).

### DISCUSSION

¶13 The right to custody of one's children, although fundamental, it is not absolute. *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, 78, ¶ 6, 117 P.3d 795, 797 (App. 2005). "The State may terminate a parent's fundamental right to a child under statutorily enumerated conditions after following specified procedures." *Id.* "To justify termination of the parent-child relationship, the trial court must find, by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533, and also that termination is in the best interest of the child." *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000).

¶14 Here, the juvenile court terminated Mother's parental rights based on A.R.S. § 8-533(B)(11), which permits termination if, in addition to being in the best interest of the child:

- (a) The child was cared for in an out-of-home placement pursuant to court order.
- (b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.
- (c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

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(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

¶15 Mother does not dispute that K.M. previously was cared for in an out-of-home placement, that ADES made diligent efforts to provide appropriate reunification services during the first dependency, that K.M. was returned to her legal custody, and that within eighteen months after K.M. was returned, he again was removed from her legal custody and is being cared for in an out-of-home placement. Nor does Mother dispute the juvenile court's best interest finding. Instead, Mother challenges the severance order on two grounds: (1) the juvenile court erred in finding that Mother is currently unable to discharge her parental responsibilities<sup>2</sup> and (2) ADES failed to make diligent efforts to reunify Mother with K.M. after the second removal to out-of-home care.

¶16 "On review . . . we will accept the juvenile court's findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). Accordingly, we address each of Mother's arguments "view[ing] the facts in the light most favorable to upholding the juvenile court's order." *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7, 225 P.3d 604, 606 (App. 2010).

I. Inability to Discharge Parental Responsibilities.

¶17 Mother argues that ADES failed to prove that she is currently unable to discharge her parental responsibilities as required by §

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<sup>2</sup> As part of this argument, Mother contends that § 8-533(B)(11) requires ADES to prove that Mother failed to remedy the cause of K.M.'s removal to an out-of-home placement. On this point, Mother seems to confuse § 8-533(B)(11) with § 8-533(B)(8). Unlike § 8-533(B)(8), § 8-533(B)(11) does not require ADES to prove that Mother failed to remedy the cause of K.M.'s removal. Because neither ADES's petition nor the juvenile court's order was based on § 8-533(B)(8), we do not address this part of Mother's argument.

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8-533(B)(11)(d). We conclude that the juvenile court did not err in finding otherwise.

¶18 The term “parental responsibilities” does not “encompass any exclusive set of factors but rather [establishes] a standard which permits a trial judge flexibility in considering the unique circumstances of each termination case before determining the parent’s ability to discharge his or her parental responsibilities.” *Maricopa Cnty. Juv. Action No. JS-5894*, 145 Ariz. 405, 409, 701 P.2d 1213, 1217 (App. 1985). Although a parent’s responsibilities might vary depending on the context and circumstances of the particular child, a parent generally must be able to provide the child with food, shelter, medical attention, and good physical care and emotion security. See *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, 97, ¶ 19, 210 P.3d 1263, 1268 (App. 2009).

¶19 Here, ADES presented evidence that Mother is unable to provide K.M. with stable housing. Mother had been asked to leave Grandmother’s house and was living, for a time, in a shelter. At the time of the severance hearing, Mother was staying at a friend’s house and was unemployed.

¶20 More importantly, due to his cerebral palsy, K.M. requires special occupational, speech, and eating therapies, which the evidence shows Mother cannot or refuses to provide. Evidence showed that, despite Mother observing and participating in K.M.’s therapies during the first dependency, K.M. regressed in his therapies after being placed back in Mother’s care. After the second dependency, K.M.’s therapist concluded that it was no longer in K.M.’s best interest to have Mother present during the therapy sessions. Furthermore, Brown opined that Mother was unable to implement her knowledge of K.M.’s therapies and that she had not demonstrated the stability or willingness to provide K.M. with proper care.

¶21 Moreover, Mother failed to provide K.M. with adequate physical care. In June 2012, K.M. required hospitalization due to weight loss. K.M.’s physician noted that K.M. presented with a four-month history of weight loss. Although the initial treatment plan was to insert a feeding tube, K.M. quickly regained weight after several days in the hospital once he was placed on what was supposed to be his normal home feeding regimen. This led K.M.’s physician to conclude that K.M.’s weight loss was the result of environmental factors and to diagnose him with “failure to thrive.” K.M.’s physician expressed concerns about improper nutrition while in Mother’s care.

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¶22 Further, Mother appeared to be under the influence during K.M.'s hospitalization. Mother reportedly was grinding her teeth, rubbing her nose, and was unable to maintain a conversation about K.M.'s treatment. ADES was concerned about Mother's substance abuse. By the time of the severance hearing, Mother had completed only one out of twenty-one required UA's, which returned positive for PCP. Mother also had someone else attempt to take the drug tests for her. Further, ADES reported difficulties in maintaining contact with Mother during the second dependency, frustrating its efforts to provide substance abuse treatment and other services.

¶23 We conclude, therefore, that substantial evidence supports the juvenile court's finding that Mother is currently unable to discharge her parental responsibilities.

II. Diligent Reunification Efforts

¶24 Mother also argues that ADES failed to make diligent reunification efforts after K.M.'s second placement into out-of-home care. We note that the record shows ADES offered substance abuse treatment and visitation services to Mother during the second dependency. Significantly, however, Mother never objected to ADES's reunification efforts below, despite multiple opportunities to do so. The juvenile court found on multiple occasions that the services provided by ADES were reasonable, with no objection by Mother. Furthermore, at the severance hearing Mother argued only that ADES failed to prove that she currently is unable to discharge her parental responsibilities. Mother did not argue below that termination was improper because of unreasonable or inadequate reunification services.

¶25 In *Christina G. v. Arizona Department of Economic Security*, we noted that a parent can waive the adequacy of ADES's reunification efforts by failing to challenge or object to those efforts during the dependency proceedings. 227 Ariz. 231, 235 n.8, ¶ 15, 256 P.3d 628, 632 n.8 (App. 2011). There, we emphasized the mother's failure to request additional services or to object to the manner in which services were provided, and her failure to object to the juvenile court's findings that the services offered were reasonable. *Id.* We declined to decide that case on waiver grounds, however, because ADES failed to raise waiver on appeal. *Id.*

¶26 ADES raises waiver here. If Mother believed ADES's services or efforts were inadequate, it was incumbent on her, through

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counsel, to alert the juvenile court and thereby afford it the opportunity to make appropriate findings or order ADES to take remedial measures.<sup>3</sup> Accordingly, we conclude that because Mother failed to request additional services, to object to the type or manner of services offered, to object to the juvenile court's repeated findings that these efforts were reasonable, or to argue during the severance hearing that ADES failed to offer reasonable reunification services, she has waived this issue on appeal.

**CONCLUSION**

¶27 For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court  
FILED: mjt

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<sup>3</sup> We note, for example, that Arizona Rule of Juvenile Court Procedure 58 requires the juvenile court to conduct review hearings “to review the progress of the parties in achieving the case plan goals,” and at which Mother, through counsel, could have objected to or raised concerns about reunification services.