IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KATHRYN H., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, O.L., J.L., *Appellees*.

No. 1 CA-JV 15-0271
FILED 3-24-16

Appeal from the Superior Court in Navajo County
No. S0900JD201400016
The Honorable Michala M. Ruechel, Judge

AFFIRMED

COUNSEL

John A. Banker, Attorney at Law, Taylor
By John A. Banker
Counsel for Appellant

Law Office of Brendon R. Rogers, Snowflake
By Brendon R. Rogers
Guardian Ad Litem for Appellees O.L. and J.L.

Arizona Attorney General's Office, Mesa
By Nicholas Chapman-Hushek
Counsel for Appellee Department of Child Safety [1]

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

K E S S L E R, Judge:

¶1 Appellant Kathryn H. ("Mother") appeals the severance of her parental rights to her children OL, born 2004, and JL, born 2005 ("the Children"). Mother argues the motion to sever her rights filed by the Children's guardian ad litem ("GAL") was improper and the dependency should have been dismissed because of the Children's reunification with Octavio L. ("Father"). She also argues that there was insufficient evidence to support that severance was in the best interests of the Children. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In May 2014, DCS took custody of the Children and filed a dependency action alleging they were dependent as to both parents.[2] Mother appeared by phone at the preliminary protective hearing in June 2014 and denied the allegations. The court provided "Form 1 Notice to

[1] The Department of Child Safety ("DCS") did not participate in briefing in this appeal. The appointed guardian ad litem filed a brief on behalf of Appellees OL and JL.

[2] The Children were allegedly dependent as to Mother due to neglect for failing to provide appropriate shelter and supervision, and because of a history of substance of abuse. Father allegedly neglected the Children by failing to provide effective parental care and control.

Parent in Dependency Action" to Mother's attorney to sign on her behalf and read Form 1 to Mother over the phone. *See* Ariz. R.P. Juv. Ct. Form 1.

¶3 Mother did not appear for the August pretrial conference at which the court found the Children dependent as to Mother and Father. Mother's whereabouts were still unknown months later, when in October 2014, the court changed physical custody of the Children to Father upon the State's motion. In November 2014, having not seen the Children in the six months since they were removed, Mother unexpectedly showed up at the Children's school. She did not have further contact with the Children.

¶4 In early February 2015, the GAL filed a petition to terminate Mother's parental rights. *See* Ariz. Rev. Stat. ("A.R.S.") § 8-533 (Supp. 2015). At a report and review hearing, Mother's attorney stated he could not locate her and that any petition had to be personally served on her. The GAL indicated he would withdraw the petition and file a motion instead, and the court permitted the motion. *See* Ariz. R.P. Juv. Ct. ("Rule") 64(A); *see* A.R.S. § 8-864 (2014) (providing court may permit filing of termination motion before permanency planning hearing).[3] In late February 2015, the GAL filed a motion pursuant to Rule 64 to terminate Mother's parental rights and requested the court set an initial termination hearing and order a social study if required. The motion asserted severance was appropriate based on three separate statutory grounds, including abandonment. *See* A.R.S. § 8-533(B)(1). Mother then moved to dismiss the dependency because, according to Mother, the Children were no longer dependent as to Father. The court denied Mother's motion to dismiss the dependency, stating it was subject to reconsideration at the May 20 report and review hearing.

¶5 On April 21, the GAL filed a notice of hearing on the termination motion also scheduled for May 20, serving the notice on Mother's attorney. *See* Rule 64(C); *see also* A.R.S. § 8-863(A) (2014) (motion must be served on all parties in accordance with Ariz. R. Civ. P. 5(c) by the party that filed the motion); Rule 64(D)(2) (providing the motion and notice

[3] At that same hearing, Mother's attorney requested that service of the termination motion be made upon Mother personally, and for investigative fees to locate her. The court gave counsel $500 to locate Mother, but it did not order personal service on Mother. *See* Ariz. R. Civ. P. 5(c) (requiring service on attorney if a person is represented; court has discretion to order service on the party). The court scheduled the next report and review hearing for May 20.

of hearing must be served at least 10 days in advance of the initial termination hearing). In addition, in early May, the court filed a minute entry further noticing the May 20 hearing as "a permanency planning hearing."

¶6 At the May 20 hearing, the court considered permanency planning, *see* A.R.S. § 8-862 (Supp. 2015), the GAL's motion to terminate, *see* Rule 65, and the motions for dismissal of the dependency action.[4] *See* A.R.S. § 8-864 (providing court "may order or permit the filing of a motion for termination . . . before the permanency hearing" and may consolidate hearings). Mother did not attend the hearing and her attorney advised the court: "I did take advantage of the . . . funds [the court granted in February] to use an investigator . . . [and then spoke] to the maternal grandmother . . . [who] told me that [Mother] was incarcerated in Maricopa County. But, unfortunately, by the time we were ready to have her transported or give any information to her, she had already been released, and now I have no idea where she is again."[5] Upon the court's inquiry, Mother's attorney confirmed he believed that service was complete "[a]nd . . . that [Mother] is aware of the fact that there is a motion to terminate her parental rights. She is probably not aware of today's date, but I believe the other parties would argue and would prevail that she certainly had an ability to know if she were interested."

¶7 The court determined Mother had been served through counsel, "did have notice of the motion," and "doesn't know about today's date." However, the court determined that failing to keep in contact with her attorney "is not good cause for [Mother's] failure to appear," and "[t]herefore, she is deemed to have admitted the allegation in the motion . . . ." Despite that conclusion, the court permitted Mother's attorney the opportunity to present witnesses, but the attorney did not offer any witnesses to testify.

¶8 After testimony from Father and a DCS supervising caseworker, including evidence about the negative effect of Mother's surprise visit to the Children's school, Mother's lack of contact with the

[4] On May 6, in a progress report to the court from a DCS case worker, the case worker requested that the case be dismissed and the Children returned to the legal care of Father. At the May 20 hearing, the State made an oral motion to dismiss the dependency petition based upon this report.

[5] The court had also granted Mother's motion in early May for transport from Maricopa County jail to the May 20 hearing.

Children since removal nearly one year earlier, her failure to provide the Children with sustenance during that time, and her lack of participation in reunification services, the court granted the motion to terminate Mother's parental rights based on abandonment. *See* A.R.S. § 8-863(C). ("The court may terminate the parent-child relationship as to a parent who does not appear based on the record and evidence presented . . . ."). The court found Mother abandoned the Children within the meaning of A.R.S. § 8-533(B)(1), for failing to maintain a normal parental relationship with the Children for more than eleven months. The court determined the GAL proved abandonment by clear and convincing evidence and proved that severance of Mother's parental rights was in the Children's best interests. At the severance hearing, the court explained "that the [M]other's sudden appearance in [the Children's lives] caused a degree of trauma and that that's continuing, and the Court finds that as long as the [M]other's rights remain out there that that concern and trauma for the [C]hildren is . . . more likely to continue . . . ." After terminating Mother's rights to the Children, the court dismissed the dependency, because the Children were no longer dependent as to Father. Mother timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235 (2014), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2015).

DISCUSSION

¶9 Mother argues that because the Children were no longer dependent as to Father, the case should have been dismissed and the court should not have proceeded with severance of her parental rights. She also contends the GAL's motion was procedurally improper, and claims that had the GAL proceeded with a petition for severance rather than the Rule 64(A) motion, she would have been served in accordance with Arizona Rules of Civil Procedure 4 and 4.1 rather than Arizona Rule of Civil Procedure 5(c), received notice, and "could have appeared" at any hearings. Finally, Mother claims the evidence does not support the determination that termination of her parental rights is in the best interests of the Children.

I. Denial of motion to dismiss dependency action

¶10 Mother argues that all parties are entitled to dismissal when children are no longer dependent as to one parent, and because the Children were no longer dependent as to Father as of the February 18 report and review hearing before she filed a motion to dismiss, the dependency case should have been dismissed and the termination motion not pursued.

¶11 On the record here, we disagree. When a child is no longer dependent, there is no longer a need for dependency proceedings. A.R.S. § 8-201(14)(a)(i) (Supp. 2015) (defining dependent child as having no parent or no parent able and willing to exercise care and control). Here, although the Children were placed in Father's physical custody starting in October 2014, the court held they remained dependent. In March 2015, when Mother moved for dismissal claiming the Children were no longer dependent, the case manager's most recent report explained Father and the Children were doing well but recommended that the Children "remain with their [F]ather in an in home dependency monitored by DCS." Mother claims that reunification with Father had been achieved in February pointing to the court's minute entry, however, that February minute entry schedules the next report and review hearing for May 20, and states "[i]t was the finding of the Court that the children were returned to the care and custody of the biological father and are doing well."

¶12 Mother points to no evidence to support her position the Children were no longer dependent. Until the case manager's May 6 progress report to the court recommending restoration of Father's full legal rights to the Children, the record does not reflect any recommendations or opinions that the Children were not dependent as Mother asserts.

¶13 Mother claims the court abused its discretion by dismissing the dependency only after terminating Mother's parental rights claiming the dependency proceedings were "artificially held open for no other reason" than to permit the GAL "to seek severance of Mother's rights." Mother cites no authority that the court could not wait to dismiss the dependency as to Father until after it determined whether Mother's rights should be severed. Mother ignores that it is up to the court to determine when a dependency ends and in this case, the dependency continued until the court found on May 20 at the permanency hearing that with Mother's rights severed, the Children no longer needed to be wards of the court since they had been reunified with Father. The court did not abuse its discretion by dismissing the dependency at the end of the hearing after making its severance determination.

II. Termination motion: service and notice to Mother

¶14 Mother maintains the GAL's motion to terminate her parental rights was improper because the court had not ordered a case plan of severance, which she contends is typically done at a permanency hearing, and the court did not direct the GAL to file the motion as required by Rule

64.[6] Mother also argues that the GAL improperly filed a motion for severance rather than a petition for severance and "[h]ad the GAL proceeded by petition as required by Rule 64(a)," rather than by motion allowing service on her attorney, she would have been served in accordance with Arizona Rules of Civil Procedure 4 or 4.1 and "would have gotten notice of any hearings and could have appeared."[7] Mother claims that having "recently been released" from prison she was "unaware of the May 20 court date and did not appear."

¶15 Here the GAL's motion was permitted under Rule 64(A), *see* A.R.S. § 8-864, and the court allowed the GAL to file a motion instead of a petition after learning that Mother's attorney could not locate her. Service of the motion on counsel is proper pursuant to Rule 5(c). *See* A.R.S. § 8-863(A). The court can permit a party to file a motion before a permanency planning hearing and may consolidate the permanency planning hearing and initial termination hearing. A.R.S. § 8-864. Therefore, the court was not required, as Mother contends, to order a motion only after a permanency planning hearing and changing the case plan to severance. Additionally, the court's knowledge of the history of the case and the record on Mother's non-participation in the proceedings supports the court's

[6] Mother also argues in her reply brief that the GAL lacked standing to bring the severance motion because the court did not first make requisite best interest findings and order the GAL to file the motion. We decline to consider Mother's standing argument because it was raised for the first time in her reply brief. *See State v. Brown*, 233 Ariz. 153, 163, ¶ 28 (App. 2013) (stating arguments raised for the first time in reply are waived); *Parker ex rel. Parker v. Ariz. Interscholastic Ass'n*, 204 Ariz. 42, 47, ¶ 16 (App. 2002) ("Arguments raised for the first time in a reply brief are not generally considered."). Moreover, the court permitted the GAL to file the motion.

[7] Arizona Rules of Civil Procedure 4 and 4.1 embody typical service requirements on the party personally, whereas, 5(c) requires service on an attorney for a represented party unless the court orders otherwise.

implicit finding that the appropriate permanent future plan for the Children was severance as to Mother.[8]

¶16 Mother argues that the GAL improperly filed the motion which purportedly caused Mother to not be aware of the date of the hearing because she was not personally served with the motion. Mother's argument fails on several grounds. First, Mother's attorney acknowledged proper service at the severance hearing and confirmed that Mother knew of the pending motion. He also did not object to proceeding without her.

¶17 Second, at the hearing the GAL indicated he wanted to withdraw the petition to sever and file a motion to sever, and the court approved the filing of such a motion. Mother's counsel had informed the court he could not locate her and asked for funds to try and find her. By allowing the motion to be filed in lieu of the petition and to allow service on the attorney, we conclude the court was concerned that if it did not order a motion to be filed, final determination of the proceedings would be unduly delayed because Mother could not be found to be personally served and had not stayed in touch with her attorney or DCS. On this record, we find no abuse of discretion in ordering a motion with service on Mother's attorney.

¶18 Third, her argument is legally insufficient. In *Mara M. v. Arizona Department of Economic Security*, Mara argued that service of a motion for termination on her attorney, rather than on her personally or by publication, violated her constitutional rights to due process. 201 Ariz. 503, 505, ¶ 14 (App. 2002). We disagreed and explained that "a motion to terminate a parent's rights, being in furtherance of the exercise of the juvenile court's continuing authority . . . may be served on the parent's attorney." *Id*. at 507, ¶ 22. We also explained that if service on Mara's attorney was not reasonably calculated to apprise Mara of the hearing based on the circumstances, the court was free to order service by other means. *Id*. at 508, ¶¶ 27-28. We noted that counsel had appeared for Mother

[8] Although the court never expressly changed the case plan to severance, Mother had been previously admonished during the dependency proceedings that she was "required to attend all court hearings. If you cannot attend a court hearing, you must prove to the Court that you had good cause for not attending. . . . If you do not participate in reunification services or fail to attend further proceedings without good cause, the Court may terminate your parental rights . . . ." *See* Ariz. R.P. Juv. Ct. Form 1.

several times and she never withdrew her consent to his representation. *Id.* at ¶ 28. We concluded:

> We appreciate that, when he was served with the motion . . . counsel had not been in contact with Mara for several months. But we also recognize that Mara was on notice of the possibility that her parental rights to [the child] could be terminated and yet she had not contacted either her attorney or CPS. Nor had CPS been able to locate Mara except when she was in jail. *Realistically, service of process on counsel in a case such as this may not in fact apprise a parent such as Mara of the pendency of termination proceedings, but, nonetheless, it is a means reasonably calculated under the circumstances to notify the parent and to protect her rights as opposed to attempted service on a person who has disappeared or service by publication.* We do not find the application of A.R.S. § 8–863 and [Arizona Rule of Civil Procedure] 5(c)(1) to be unconstitutional.

Id. (emphasis added).

¶19 Here, like *Mara*, Mother did not attend hearings and her attorney was unable to consistently locate her. She did not keep her attorney apprised of her whereabouts or how to contact her, had not maintained contact with DCS since June 2014 after which DCS unsuccessfully attempted to locate her. Also, both here and in *Mara*, counsel moved for alternative service on the parent personally which the court denied. *Id.* at 505, ¶¶ 12-13. Finally, like *Mara*, Mother did not allege that she lacked notice of the possibility that her parental rights would be terminated.

¶20 Whether a parent has good cause for failure to appear is within the province of the trial court to determine and we will reverse such a determination only if the court abused its discretion. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15 (App. 2007). We agree with the trial court that the record supports that Mother did not keep in contact with her attorney. *See supra* ¶¶ 6-7 and n.3. A reasonable parent would have been diligent in contacting and keeping her attorney and/or DCS apprised of her contact information. *See Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993) (explaining "[n]eglect is excusable when it is such as might be the act of a reasonably prudent person in the same circumstances"); *Hackin v. First Nat'l Bank of Ariz.*, 5 Ariz. App. 379, 385 (1967) ("We recognize that where a client wil[l]fully or negligently fails to keep in touch with an attorney so that the attorney cannot properly inform him as to the pending litigation

that he cannot complain because he does not realize the date of the trial."). Thus, we find no abuse of discretion in allowing the severance to go forward based on service of the motion on Mother's counsel.

III. Best interests

¶21 Mother argues the court abused its discretion by finding severance was is in the Children's best interests because (1) there was no professional testimony establishing that the Children were harmed or traumatized by Mother's surprise visit to the Children's school during the dependency, and Father's testimony was insufficient to show harm by continuing the parent-child relationship; and (2) the Children did not provide input, and may not have been informed of the hearing.

¶22 To justify the severance of a parental relationship the court must find by a preponderance of the evidence that severance of the relationship is in the child's best interest. *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41 (2005). We do not reweigh the evidence, but "look only to determine if there is evidence to sustain the court's ruling." *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). We will affirm a lower court's findings of fact when there is any reasonable evidence in the record that justifies the decision. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, 93-94, ¶ 4 (App. 2009).

¶23 Mother argues there was no professional evidence of harm or trauma to the Children and there was insufficient evidence of harm "based solely on Father's testimony" that the Children were scared and nervous about Mother's surprise visit to the school. Mother provides us no authority that a finding of possible harm to the Children must be supported by "professional evidence." Both Father and the supervising caseworker testified about Mother's surprise visit to the Children's school, and Father testified about the negative effects of the visit. The court determined that the Children would be more secure and not have to worry about random future surprise visits or assertions of control if the court terminated Mother's parental rights. *See supra* ¶ 8. This finding is sufficient. *See Mary Lou C.*, 207 Ariz. at 50, ¶ 19 ("[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." (citation omitted)). The record sufficiently supports the court's conclusion.

¶24 Mother argues the Children had a right to be informed of the proposed severance, but claims nothing is known about "what, if anything, the children knew" and "how they felt about it." Mother did not raise this

argument in the trial court, and thus, it is waived absent fundamental error causing Mother prejudice. *See Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, 94, ¶ 22 (App. 2005); *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20 (2005). Section 8-221(J) (2014) provides: "The guardian ad litem or attorney for the juvenile also shall meet with the juvenile before all substantive hearings. Upon a showing of extraordinary circumstances, the judge may modify this requirement for any substantive hearing." The GAL argues that the Children's purported lack of knowledge about the hearing and severance is pure speculation and belied by the evidence in the record showing that the matter was discussed with the Children.

¶25 The motion to terminate Mother's rights states the GAL notified the Children of the motion and also details the feelings the Children shared about the matter including that they were scared by their Mother's visit, worried she may try to take them, and happy with Father. The court found compliance with A.R.S. § 8-221(J) in February. Mother points to no authority that a court must expressly find that the GAL complied with A.R.S. § 8-221(J) and we will imply any additional findings which support the court's ultimate decision provided they do not conflict with other express findings. *See Coronado Co. v. Jacome's Dep't Store, Inc.*, 129 Ariz. 137, 139 (App. 1981) ("Implied in every judgment, in addition to express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings.").

¶26 Although the court's minute entry and final judgment for the termination hearing do not explicitly state that the GAL was compliant with A.R.S. § 8-221(J), we can and will find that the court so held. The record supports such a finding because the GAL represented he had met with the Children prior to filing the motion to terminate and there is no evidence suggesting that the Children wanted to, but were denied the opportunity to participate in the proceedings or provide input in whatever manner Mother has in mind. Finally, Mother does not contend, and there is no evidence to suggest that the Children disagreed with severance of her rights. We find no abuse of discretion and affirm the court's severance determination.

CONCLUSION

¶27 For the reasons stated we affirm the severance of Mother's parental rights to OL and JL.