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

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JESUS R., JOZELIN A., *Appellants*,

*v.*

DEPARTMENT OF CHILD SAFETY, I.R., I.R., I.R., *Appellees*.

No. 1 CA-JV 19-0430
FILED 9-22-2020

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Appeal from the Superior Court in Maricopa County
No. JD30930 and JS19535
The Honorable Sara J. Agne, Judge

**AFFIRMED**

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COUNSEL

David W. Bell, Attorney at Law, Higley
By David W. Bell
*Counsel for Appellant Jesus R.*

Denise L. Carroll, Esq, Scottsdale
By Denise L. Carroll
*Counsel for Appellant Jozelin A.*

Arizona Attorney General's Office, Phoenix
By Doriane F. Neaverth
*Counsel for Appellee Department of Child Safety*

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**MEMORANDUM DECISION**

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jennifer B. Campbell and Judge Lawrence F. Winthrop joined.

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**S W A N N**, Chief Judge:

**¶1** Jozelin A. ("Mother") and Jesus R. ("Father") appeal the superior court's order terminating their parental rights to their three children. Father argues that insufficient evidence supported termination on the abuse and neglect ground, and both Parents argue that severance was not in the children's best interests and that the termination statute is unconstitutional because it does not require the superior court to consider a parent's rehabilitative efforts. For reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

**¶2** Mother and Father are the biological parents of I.E.R., born in August 2013, I.I.R., born in August 2014, and I.G.R., born in May 2017. Between February and April 2015, I.I.R. suffered from two skull fractures and a fracture to her right femur while in the care of the children's maternal grandmother. Mother agreed not to allow the maternal grandmother to visit the children unsupervised. In June 2015, however, Mother left I.E.R. and I.I.R. in the maternal grandmother's care.

**¶3** A month later, the Department of Child Safety ("DCS") filed a dependency petition as to I.E.R. and I.I.R. after Mother stated that the maternal grandmother had a right to care for the children and that she had no concerns for the children's safety in her care, despite the history of multiple, severe injuries occurring to the children while in the maternal grandmother's care. Parents fully participated in services, and in July 2016, DCS moved to dismiss the dependency petition.

**¶4** I.G.R. was born prematurely in May 2017 and spent two months in the hospital after his birth. I.G.R. has cerebral palsy, a history of seizures, and is developmentally disabled.

**¶5** About a month after I.G.R. was released from the hospital into Parents' care, Mother found him unresponsive. She called 911 and started to perform CPR. I.G.R. was transported to the hospital where doctors

found bruising on his arms, blood on his face, multiple subdural hematomas (with old and new blood), and healing rib fractures on his right side. Doctors opined that these injuries were caused by "multiple instances" of "non-accidental trauma." And although Parents were the only caregivers of I.G.R., they were unable to explain to police how he sustained those injuries. DCS then filed a dependency petition and the children were removed from Parents' care. Parents fully participated in services, and those services were closed out after Mother and Father met their individual treatment goals.

**¶6** During individual counseling sessions, Mother and Father repeatedly denied knowing how I.G.R. sustained his injuries and denied abusing him. Eventually, however, Mother expressed that she suspected Father was responsible for I.G.R.'s injuries. She also considered seeking a restraining order against Father after he began stalking her and came close to hitting her, but she failed to do so. And Father testified that although he had no explanation for I.G.R.'s injuries, they were "concerning" and that Mother could have possibly caused them.

**¶7** DCS moved to terminate Parents' parental rights based on abuse, neglect, and nine and fifteen months' time in care. *See* A.R.S. § 8-533(B)(2), (8)(a), (8)(c). After a five-day trial, the superior court found that termination was supported by the abuse and neglect ground and that termination would be in the children's best interests. Parents appeal.

## DISCUSSION

**¶8** The superior court may terminate a parent-child relationship if clear and convincing evidence establishes at least one statutory ground for severance and a preponderance of the evidence shows severance is in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22 (2005). We review a severance ruling for an abuse of discretion, accepting the superior court's factual findings unless clearly erroneous and viewing the evidence in the light most favorable to sustaining the court's ruling. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2 (App. 2008); *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8 (App. 2004). We defer to the superior court's credibility determinations. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002).

**¶9** Under A.R.S. § 8-533(B)(2), a parent's rights may be terminated if "the parent has neglected or wil[l]fully abused a child." Abuse is defined as "the infliction or allowing of physical injury,

impairment of bodily function or disfigurement . . . ." A.R.S. § 8-201(2). Neglect is defined as

> [t]he inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare, except if the inability of a parent . . . to provide services to meet the needs of a child with a disability or chronic illness is solely the result of the unavailability of reasonable services.

A.R.S. § 8-201(25)(a).

## I. REASONABLE EVIDENCE SUPPORTS THE SUPERIOR COURT'S ORDER SEVERING PARENTS' RIGHTS UNDER A.R.S. § 8-533(B)(2).

**¶10** Father contends that the superior court erred by finding abuse because the facts presented do not support such a finding by clear and convincing evidence. Specifically, Father disputes the superior court's findings that (1) Father violated the safety plan during the first dependency by allowing maternal grandmother to care for the children, (2) had he made significant behavioral changes during the early stages of the case, reunification might have occurred, (3) Father refused to explain how I.G.R.'s injuries occurred and withheld information about the child's injuries, (4) both Parents likely caused I.G.R.'s injuries, (5) Father abused I.G.R, and (6) Father neglected I.G.R. Father also contends that the superior court erred by making negative inferences about Father based on hearsay statements made by Mother and statements contained in an email authored by a psychologist who did not interview Father.

**¶11** Father's contentions, however, largely mischaracterize the superior court's findings. For example, although Father claims that the superior court determined that it was "probable" that both Parents were the perpetrators of the abuse, the superior court actually found that "Mother or Father or both knew or reasonably should have known that the other abused [I.G.R.], as he was in their exclusive care when he suffered his near-fatal injuries."

**¶12** In any event, the evidence in this record, viewed in the light most favorable to sustaining the superior court's order, is more than sufficient to establish that Parents neglected and abused the children. During the hearing, a nurse testified about four separate and distinct

injuries that occurred throughout the course of both dependency cases. The superior court also heard testimony that I.G.R.'s injuries were caused by non-accidental trauma. Neither parent could explain how I.G.R. was injured, despite the fact that he was injured while exclusively in their care. And during the evidentiary hearing, the case manager testified that Father failed to achieve the behavioral changes necessary to protect the children, despite two rounds of services.

**¶13** Eventually, both Parents admitted that they suspected that the other was responsible for I.G.R's injuries. Despite these admissions, they continued to allow the other to spend time with the children and did not timely express their suspicions to DCS, the court, or the police. The case worker also testified that although Parents were able to identify I.G.R.'s medical needs, they would not be able to meet them should the child be returned to their care. Accordingly, reasonable evidence supports the superior court's finding of abuse and neglect.

## II. PARENTS HAVE WAIVED THE ARGUMENT THAT THE TERMINATION STATUTE IS UNCONSTITUTIONAL.

**¶14** Parents also contend that the termination statute is unconstitutional because it does not require the superior court to consider their successful participation in rehabilitative services. Mother relies on Justice Bolick's concurrence in *Alma S. v. Department of Child Safety*, contending that the termination statute violates due process by permitting termination without a finding that "the state has made diligent efforts to reunify the family or that the parent has failed to remediate the problem." 245 Ariz. 146, 154, ¶ 33 (2018) (Bolick, J. concurring).

**¶15** But Parents failed to raise this argument below, thereby waiving it. *See Stokes v. Stokes*, 143 Ariz. 590, 592 (App. 1984). And waiver aside, the superior court did consider Parents' rehabilitative efforts, finding that DCS "made diligent efforts to provide appropriate reunification services to Mother and Father." The court went on to further note that DCS "commend[ed] the parents [for] their continued efforts and engagement in services, however [DCS was] concerned that despite the behavioral changes parents still lack the willingness to acknowledge their role in how the injuries came to be." The court thereby considered Parents' rehabilitative efforts and determined that those efforts would not protect the children from future risk of harm.

## III. SUFFICIENT EVIDENCE SUPPORTS THE COURT'S FINDING THAT SEVERANCE WAS IN THE CHILDREN'S BEST INTERESTS.

**¶16** Parents contend that severance was not in the children's best interests. Specifically, Mother contends that greater weight should have been given to experts who testified that the children should be reunited with their parents. And Father contends that severance was not in the children's best interests because he has remedied the circumstances that cast doubt on his parenting abilities, he is a fit and proper person to care for his children, and he visits the children and financially cares for them.

**¶17** In addition to finding the statutory grounds for termination, the superior court must also find that severance is in the children's best interests by a preponderance of the evidence. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 149–50, ¶ 8 (2018). Once the court has found at least one statutory ground for severance, it may "presume that the interests of the parent and child diverge." *Id.* at 150, ¶ 12 (citation omitted). "[T]ermination is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* at ¶ 13. The "child's interest in stability and security" is the touchstone of our inquiry. *Id.* at ¶ 12 (citation omitted).

**¶18** Here, Parents essentially ask that we reweigh the evidence, which is not our function. *Id.* at 52, ¶ 18. Sufficient evidence supports the superior court's finding that severance was in the children's best interests. Adoption would provide the children with permanency and stability, and severance would free the children for adoption. The children are together in adoptive placement and are no longer at risk of abuse. And despite Parents' successful completion of rehabilitative services, Parents still "cannot insure the [children's] safety and they cannot recognize or discuss the reasons of how and why their child has gotten hurt on several occasions." Accordingly, the superior court did not err by finding that severance was in the children's best interests.

## CONCLUSION

**¶19** Because reasonable evidence supports the superior court's order terminating Parents' parental rights to I.E.R., I.I.R., and I.G.R., we affirm.


AMY M. WOOD • Clerk of the Court
FILED: AA