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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LARA K., Appellant/Cross-Appellee, v. DWIGHT K., Appellee/Cross-Appellant, and GABRIEL K. and SAMUEL K., Appellees.	2 CA-JV 2012-0069 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S19740399

Honorable Leslie Miller, Judge

AFFIRMED; CROSS APPEAL DISMISSED

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E S P I N O S A, Judge.

¶1 Lara K. appeals from the juvenile court's order terminating her parental rights to her sons Gabriel K., born November 2000, and Samuel K., born May 2004, pursuant to a petition filed by the children's father, Dwight K. Lara argues insufficient evidence supported the court's finding that termination was warranted on the grounds of chronic mental illness pursuant to A.R.S. § 8-533(B)(3), and that termination is in the children's best interests. She also contends counsel appointed for the children provided ineffective assistance because of a purported conflict in the children's interests and that conflict required separate counsel be appointed for each child. Dwight cross-appeals, arguing the court erred in finding he had not demonstrated that termination of Lara's parental rights was warranted on the ground of abuse pursuant to § 8-533(B)(2). We affirm the court's ruling terminating Lara's parental rights and dismiss Dwight's cross-appeal.

¶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. *See Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009).

¶3 In February 2011, Dwight filed a petition to terminate Lara's parental rights to Gabriel and Samuel on the basis of neglect and abuse pursuant to § 8-533(B)(2) and mental illness pursuant to § 8-533(B)(3). After a twenty-day severance hearing, the juvenile court rejected Dwight's claim that termination was warranted on the ground of abuse. The court determined that, although there were plentiful instances of inappropriate conduct by Lara and she did not "always demonstrate the best judgment or parenting skills," she "ha[d] never caused any significant injury to the boys" and there was no evidence "support[ing] an allegation of emotional abuse."

¶4 The juvenile court found, however, that Lara suffered from a chronic psychotic disorder that would "continue for a prolonged indeterminate period of time." It noted that, although Lara was "capable of appropriate interaction with her children during limited periods of supervised visitation, all doctors have recommended" that she be permitted only supervised visitation. The court further observed that Lara persistently denied having a mental illness and refused medication to treat it. Thus, it concluded, although Lara loved her children and wished to parent them, her illness and her "unwillingness to accept it . . . preclude her from being able to effectively discharge her parental responsibilities." The court therefore found termination warranted pursuant to § 8-533(B)(3) on the ground of chronic mental illness. It further determined that

termination of Lara's parental rights was in the children's best interests based, *inter alia*, on their fear of Lara and their current, stable home with Dwight and his spouse, who is willing to adopt them.

¶5 Lara first argues there was insufficient evidence to support the juvenile court's conclusions that termination was warranted based on mental illness and was in the children's best interests. Pursuant to § 8-533(B)(3), termination is warranted when a "parent is unable to discharge parental responsibilities because of mental illness . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." That termination is in a child's best interests "'may be established by either showing an affirmative benefit to the child by removal or a detriment to the child by continuing in the relationship.'" *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 14, 53 P.3d 203, 207 (App. 2002), *quoting Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 557, 944 P.2d 68, 72 (App. 1997).

¶6 Lara does not deny on appeal that she has a mental illness, but argues there was insufficient evidence it rendered her unable to discharge her parental responsibilities or that her illness would continue for a prolonged, indeterminate amount of time. Although she cites some evidence that suggests her mental illness was not as severe as it had been in previous years, she ignores the juvenile court's findings concerning the effect of that illness on her ability to parent for the foreseeable future. Specifically, she does not address the court's finding that, since supervised visitation began in 2007, she had not made sufficient progress in coping with her mental illness for any doctor or other care provider to recommend unsupervised visitation. And she disregards testimony that her

condition would persist for an extended, indeterminate period.[1] She further ignores the court's finding that she persistently has failed to take prescribed medications to control her illness and that the additional "stress of parenting for two boys" could risk her stability.

¶7 With respect to her argument that the juvenile court erred in finding termination in the children's best interests, Lara focuses on evidence that her behavior during supervised visitation indicated a bond between her and Samuel, that she behaved appropriately during those visitations, and that Samuel was receptive to her gestures of affection. She ignores the court's findings, however, that Gabriel's mental health and behavior had improved since being separated from Lara, that Samuel and Gabriel had expressed fear of being alone with her, that the children currently are in a stable home, and that Dwight's spouse wishes to adopt the children. *See Jesus M.*, 203 Ariz. 278, ¶¶ 14-16, 53 P.3d at 207-08 (availability of adoptive placement and stable environment support best interests finding).

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[1]Lara suggests the juvenile court erred in relying on testimony by doctors indicating she would not be capable of parenting in the near future. She asserts those doctors were not "qualified to make such statements" because they were not "expert[s] in parenting." It is not clear to which testimony Lara refers, as she has provided no citation to the record. Nor does she cite any authority suggesting that, as a matter of law, the court could not rely on the testimony of mental health experts to evaluate her competency as a parent. She also fails to support her contention that the court erred by adopting some, but not all, of the opinions of one doctor. *See* Ariz. R. Civ. App. P. 13(a)(6) (brief shall contain "argument . . . with citations to the authorities, statutes and parts of the record relied on"); Ariz. R. P. Juv. Ct. 106(A) (Rule 13, Ariz. R. Civ. App. P., applies in appeals from juvenile court). Accordingly, Lara has waived these arguments on appeal, and we do not address them further. *See Polanco v. Indus. Comm'n of Ariz.*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶8 In sum, Lara asks us to reweigh the evidence on appeal and substitute our judgment for that of the juvenile court. We will not do so. *See id.* ¶ 4 (we defer to juvenile court to determine witness credibility, evaluate evidence, and resolve conflicts); *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005) (appellate court does not "reweigh the evidence presented"). In granting the petition to terminate Lara's parental rights, the court prepared a thorough minute entry setting out its factual findings and legal conclusions. We have determined that the record contains reasonable evidence to support those findings with respect to both the statutory ground for termination and the children's best interests. *See Denise R.*, 221 Ariz. 92, ¶ 4, 210 P.3d at 1264-65 (factual findings upheld if supported by reasonable evidence). The court's factual findings, in turn, support its legal conclusion that severing Lara's parental rights was warranted under § 8-533(B)(3) and was in the children's best interests. We therefore adopt the court's findings of fact and approve its conclusions of law. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08, *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶9 Before the severance hearing began, Lara requested that the juvenile court appoint separate counsel for Samuel and Gabriel, asserting they "have different positions" and therefore "a conflict exists and due process requires that Samuel and Gabriel each have their own attorney." At a subsequent hearing, Lara explained that, because Samuel wished to continue visitation with Lara and Gabriel did not, their currently appointed counsel could not represent them both. The children's appointed counsel, Edith Croxen, stated the children had "consistent interests" and "want[] the

severance to be granted by the Court" and to be adopted by their stepmother. Croxen further explained she could accommodate their differing wishes on visitation, although she acknowledged she had not yet discussed visitation with them. The court denied Lara's motion for separate counsel.

¶10 Approximately one month later, Lara renewed her motion based on a letter written by a marriage and family therapist and addressed to Croxen claiming that Samuel wished to continue to see Lara and that he "does not understand that adoption means that he will no longer see [her]." Croxen informed the juvenile court she had discussed the matter with Samuel and he understood that, if the severance occurred, he could be adopted and "he might not have the opportunity to see his mother." The court rejected Lara's renewed motion.

¶11 Lara contends on appeal that Croxen was ineffective because she allegedly ignored Samuel's wishes to have visitation with his mother and "did not argue against the termination" of Lara's parental rights based on Samuel's purported desire "to continue his relationship with his mother." She further asserts that the alleged conflict between the siblings' interests required the juvenile court to have appointed separate counsel for them.

¶12 We first question whether Lara has standing to assert that Croxen had a conflict requiring appointment of another attorney or that she had been ineffective in failing to make certain arguments. *See In re Pima Cnty. Juv. Sev. Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993) (concluding parent "has no standing" to assert conflict by children's counsel). Although Arizona law recognizes that a party may "be allowed to interfere with the attorney-client relationship of his opponent"

"in extreme circumstances," *Alexander v. Superior Court*, 141 Ariz. 157, 161, 685 P.2d 1309, 1313 (1984), we need not resolve this question here. The issue was not raised below, and standing is subject to waiver. *See State v. B Bar Enters.*, 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982). We emphasize, however, that challenges to opposing party's counsel are disfavored. *See Alexander*, 141 Ariz. at 161, 685 P.2d at 1313. Indeed, the potential for abuse inherent in such challenges in the dependency context strongly suggests a parent should not be permitted to raise this type of claim.

¶13 The law governing ineffective assistance claims in proceedings to terminate parental rights is not fully developed in Arizona. We previously have suggested a parent has a due process right to the effective assistance of the parent's own counsel to the extent necessary to ensure severance proceedings are fundamentally fair and the results of those proceedings are reliable. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 14, 173 P.3d 1021, 1025 (App. 2007). But, as noted above, we question whether Lara has standing to assert a claim of ineffective assistance of her children's counsel and, in any event, she did not raise this argument below despite having had the opportunity to do so.[2] Thus, she has waived this claim on appeal and we do not address it further. *Trantor*

[2]In the more typical case of a claim of ineffective assistance of counsel in a severance action, a party may not have the opportunity to raise the claim until new counsel is appointed—either for appeal or by the party's request. *Cf. State v. Bennett*, 213 Ariz. 562, ¶ 14, 146 P.3d 63, 67 (2006) (improper for counsel to argue own ineffectiveness). Here, however, we can find no reason for Lara to have failed to raise this argument in the trial court—the more suitable forum given the fact-intensive nature of this type of claim. *See State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) ("Because [claims of ineffective assistance of counsel] are fact-intensive and often involve matters of trial tactics and strategy, trial courts are far better-situated to address these issues.").

v. Fredrikson, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶14 And we find no error in the juvenile court's denial of Lara's motions seeking the appointment of separate counsel for Samuel. A juvenile court generally is required to appoint counsel for a child in a severance action when "such counsel would contribute to promoting the child's best interest by serving an identifiable purpose such as advocating the child's position in the dispute or ensuring that the record be as complete and accurate as possible." *In re Yavapai Cnty. Juv. Action No. J-8545*, 140 Ariz. 10, 16, 680 P.2d 146, 152 (1984); *see also* A.R.S. § 8-221. And, of course, counsel for a child must not have a concurrent conflict of interest such that "the representation of one client will be directly adverse to another client" or that would create "a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client." ER 1.7(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. We review a court's decision whether to disqualify counsel for an abuse of discretion. *See Amparano v. ASARCO, Inc.*, 208 Ariz. 370, ¶ 19, 93 P.3d 1086, 1092 (App. 2004).

¶15 Lara has cited no authority, and we find none, suggesting the juvenile court was not entitled to rely on Croxen's avowals that Samuel understood the proceedings and, despite wanting to continue to have a relationship with his mother, nonetheless believed that termination of Lara's parental rights was in his best interests. And the record flatly contradicts Lara's contention that Croxen had admitted she did not explain to Samuel that Lara would have no visitation rights following termination of her parental rights. Although Samuel and Gabriel may have had different feelings about the extent of

the relationship they wished to maintain with Lara, there is simply no evidence their position on the ultimate question—whether Lara's parental rights should be terminated—was materially different. Thus, the court did not err by declining to appoint separate counsel for Samuel.

¶16 For the reasons stated, we affirm the juvenile court's order terminating Lara's parental rights to Samuel and Gabriel. We consequently need not address the argument Dwight raises on cross-appeal that the juvenile court erred in rejecting abuse as a basis for terminating Lara's parental rights. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 12, 995 P.2d 682, 685 (2000) (severance justified if juvenile court finds "at least one of the statutory grounds"). Dwight's cross-appeal therefore is dismissed as moot.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.