

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 26 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JAMES F.,	)	2 CA-JV 2013-0017
	)	DEPARTMENT B
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
FARIN H., HERBERT H., and	)	Appellate Procedure
KETHAN F.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. S200157

Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

Emily Danies

Tucson  
Attorney for Appellant

Lalosh Law, P.L.L.C.  
By Diane M. Lalosh

Tucson  
Attorneys for Appellees Farin H. and Herbert H.

ECKERSTROM, Judge.

¶1 James F. appeals from the juvenile court's order terminating his parental rights to his son Kethan, born August 2008, pursuant to a petition filed by the child's mother, Farin H., and stepfather, Herbert H. James asserts the juvenile court erred in denying his motion to appear telephonically and violated his due process rights by determining he had admitted the allegations in the severance petition by failing to appear personally at the severance hearing. He additionally claims to be a member of an Indian tribe and thus that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 through 1963, applies to this case. Finally, James argues the court erred in finding termination of his parental rights was in Kethan's best interests. We affirm.

¶2 Farin and Herbert filed a petition to terminate James's parental rights on the bases of abandonment and emotional abuse. James appeared telephonically at the initial hearing, and the juvenile court advised him he also could appear telephonically for a case conference and status hearing. At that status hearing, the court gave James permission to appear telephonically for the pretrial conference, but advised James that he "must appear" at the scheduled contested severance hearing "or the Court could proceed in his absence including an order that terminates his parental rights." The court permitted James to appear telephonically at another status hearing, but "admonishe[d him] of the consequences of failing to attend any future hearings."

¶3 Approximately one week before the severance hearing, James filed a motion requesting permission to appear telephonically at that hearing. James asserted that his father had "multiple heart bypass surgery this past week" and that he "is the sole

care provider for his father.” Farin objected to James appearing telephonically and additionally asked the juvenile court “to preclude and prohibit [James] from introducing any evidence or calling any witnesses on his behalf in this matter” because he had not provided a pretrial statement.

¶4 On the day of the hearing, James’s counsel repeated his request that James be permitted to appear telephonically and informed the juvenile court that James was not present and “will not be appearing today.” The court concluded James “had not shown good cause for his failure to appear” and was voluntarily absent. The court found James therefore was “deemed to have admitted the allegations in the petition,” and ordered that the hearing proceed in his absence. Farin, Herbert, and the author of a social study testified. The court found by clear and convincing evidence that termination of James’s parental rights was warranted on the ground of abandonment, and it further found by a preponderance of the evidence that termination was in Kethan’s best interests. This appeal followed.

¶5 James first argues the juvenile court erred in denying his motion to appear telephonically, stating that the court had “waited until the day of trial” to rule on his request and that he had “made a good faith effort . . . to appear telephonically.” But James cites no authority identifying our standard of review nor suggesting that a juvenile court abuses its discretion by rejecting a request for telephonic appearance in these circumstances. *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,” and “the proper

standard of review on appeal shall be identified”); Ariz. R. P. Juv. Ct. 106(A) (Rule 13, Ariz. R. Civ. App. P., applies in appeals from juvenile court). He instead relies on documents not presented to the juvenile court that he purports support his claim that his father had recently had surgery and required care. We will not consider evidence not first presented to the juvenile court. See *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4-5, 795 P.2d 827, 830-31 (App. 1990); *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 472, 702 P.2d 696, 701 (App. 1984).

¶6 James asks, however, that we “accept these documents” because a claim of ineffective assistance of counsel is not “available for the instant Appeal.”<sup>1</sup> He cites no authority suggesting that alleged ineffective assistance of counsel would permit us to consider matters outside the record. And James’s failure to identify any basis for us to reverse the court’s ruling waives this claim on review. See *Polanco v. Indus. Comm’n*, 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).

¶7 James also asserts the juvenile court violated his due process rights by denying his motion to appear telephonically, thereby preventing him from presenting his own evidence. James is correct that parents have “a fundamental liberty interest in the

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<sup>1</sup>This court has observed that Arizona law has not squarely addressed whether “ineffective assistance of counsel [can] justify reversal of a juvenile court’s order terminating parental rights.” *John M. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 320, ¶¶ 11 & 12, 173 P.3d 1021, 1024 (App. 2007). But we have suggested a parent has a due process right to the effective assistance of counsel to the extent necessary to ensure severance proceedings are fundamentally fair and the results of those proceedings are reliable. *Id.* ¶ 14.

care, custody, and management of their children”; thus, a court may not sever parental rights without “‘fundamentally fair procedures’ that satisfy due process requirements.” *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24, 110 P.3d 1013, 1018 (2005), quoting *Santosky v. Kramer*, 455 U.S. 745, 754 (1982). “Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979).

¶8 Rule 42, Ariz. R. P. Juv. Ct., gives the court “the authority, but not an obligation, to allow the parents to appear by telephone rather than in person.” *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 14, 119 P.3d 1034, 1037 (App. 2005). And a parent may waive his or her right to participate in a hearing by failing to personally appear if that parent has been adequately informed that waiver could result. See Ariz. R. P. Juv. Ct. 66(D)(2); *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶¶ 19-20, 181 P.3d 1126, 1132 (App. 2008). James does not assert that he had insufficient notice of the hearing or of the possible consequences of failing to personally appear as directed. And, in any event, he has not provided this court with transcripts of any of the hearings during which he was informed of the consequences of failing to appear. See Ariz. R. P. Juv. Ct. 104(E) (specifying procedure for appellant to request transcript “of any proceeding or part thereof not automatically included” in record on appeal). We thus must presume those transcripts would support the court’s conclusion that James had knowingly waived his right to present evidence at the severance hearing by failing to appear as directed. See *In re Maricopa Cnty. Juv. No. J-86509*, 124 Ariz. 377, 377, 604 P.2d 641, 641 (1979).

¶9 James next claims that he had “informed his [trial] attorney that he was a member of the Southern Cherokee Nation of Kentucky tribe” and that “this information was included in the birth certificate questionnaire,” but that counsel “did not obtain the proper documentation.” James argues that, because a claim of ineffective assistance of counsel is unavailable “in a civil appeal,” we should allow him to provide this court with “membership documents” and, based on those documents, determine Kethan is subject to ICWA, “vacate the severance on this ground[,] and transfer jurisdiction to the tribe.”

¶10 Again, this court will not consider material not in the record. *See GM Dev. Corp.*, 165 Ariz. at 4-5, 795 P.2d at 830-31; *N. Ariz. Gas Serv.*, 145 Ariz. at 472, 702 P.2d at 701. Nor has James suggested this issue involves the juvenile court’s subject matter jurisdiction, or provided any other potential basis for this court to address the issue for the first time on appeal. *See State v. Silva*, 222 Ariz. 457, ¶ 9, 216 P.3d 1203, 1205 (App. 2009) (“[S]ubject matter jurisdiction is never waived and can be raised for the first time on appeal.”); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error on appeal waives argument); *Monica C. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (fundamental error review applicable to severance appeals); *see also Valerie M. v. Ariz. Dep’t of Econ. Sec.*, 219 Ariz. 331, ¶¶ 13-14, 198 P.3d 1203, 1206 (2009) (observing ICWA “provides that tribal courts generally have exclusive jurisdiction for child custody proceedings involving Indian children who reside or are domiciled within the reservation” but that state courts “will continue to adjudicate custody cases involving

[other] Indian children”). And James has not developed or supported with legal authority any argument that counsel was ineffective in failing to raise this issue in the juvenile court. Accordingly, we do not address this argument further. *See Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2.

¶11 Finally, James asserts the juvenile court’s best-interests finding “violated [his] due process rights” because the court “denied [him] the right to telephonic appearance” and “was only privy to the information given by the mother, stepfather and the social study.” To the extent his argument depends on his claim that the court violated his due process rights by finding him voluntarily absent, we have rejected that argument. In any event, we need not address this argument further because James has not cited any supporting authority or provided any meaningful legal argument. *See id.*

¶12 The juvenile court’s order terminating James’s parental rights to Kethan is affirmed.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Presiding Judge

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