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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LISA C., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and J.M., Appellees.	2 CA-JV 2013-0051 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J17481300

Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin
Tucson
Attorney for Appellant

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By Laura J. Huff
Tucson
Attorneys for Appellee Arizona Department of Economic Security

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E C K E R S T R O M, Judge.

¶1 Lisa C., the mother of J.M., born in August of 2005, challenges the juvenile court's May 2013 order terminating her parental rights on the grounds of chronic abuse of drugs and alcohol and length of time in court-ordered care, pursuant to A.R.S. § 8-533(B)(3) and (B)(8)(c), respectively. Lisa maintains the Arizona Department of Economic Security's (ADES) policy of considering a diluted urine sample submitted for substance testing to be a positive test result violated her rights to due process and equal protection under the state and federal constitutions. She contends that without this evidence, there was insufficient evidence establishing the two statutory grounds for terminating her rights. She also challenges the sufficiency of the evidence to support the court's finding that termination of her rights was in J.M.'s best interests. We affirm for the reasons stated below.

¶2 When reviewing an order terminating a parent's rights, we view the evidence in the light most favorable to sustaining the juvenile court's ruling. *See Lashonda M. v. Ariz. Dep't of Econ. Sec*., 210 Ariz. 77, ¶ 13, 107 P.3d 923, 928 (App. 2005). Thus, "we will accept the juvenile court's findings of fact unless no reasonable evidence supports [them]." *Jesus M. v. Ariz. Dep't of Econ. Sec*., 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). That is, we will not disturb the ruling unless it is clearly erroneous. *Id*.

¶3 The record and the evidence presented during the contested severance hearing established J.M. had tested positive for cocaine at birth. Child Protective Services (CPS) took J.M. into protective custody and filed a dependency petition,

alleging Lisa had a significant history of substance abuse and that there had been domestic violence involving Lisa and J.M.'s father, Danny M. In September 2005, Lisa and Danny admitted the allegations of an amended petition and the juvenile court adjudicated J.M. dependent. ADES provided and Lisa participated in a variety of services designed to reunify the family. In January 2007, the court dismissed the dependency.

¶4 Over the next four years, CPS received reports that Lisa and/or Danny had abused J.M., had been using drugs and alcohol, and had engaged in domestic violence. CPS also received reports that the parents and Lisa's boyfriend had gone to J.M.'s school smelling of alcohol, appearing intoxicated, and J.M. had been sent to school dirty. In January 2011, Tucson police and CPS received a report that Danny was abusing J.M. by shouting and cursing at the child, kicking him, and dragging him. CPS took J.M. into protective custody and ADES filed a dependency petition in February. In March 2011, J.M. was adjudicated dependent for the second time after the parents admitted allegations in an amended dependency petition.

¶5 ADES again provided Lisa with a variety of reunification services. In June 2012, after a permanency hearing, the juvenile court found Lisa was only partially compliant with the case plan and that J.M. could not safely be returned to either of his parents. After the court granted ADES's request to change the case plan to severance and adoption, ADES filed a motion to terminate both parents' rights to J.M. The court

granted the motion following a contested severance hearing, which was held over a six-day period between September 2012 and March 2013.

¶6 Lisa contends on appeal the juvenile court violated her constitutional rights because it relied on evidence that she had submitted diluted urine samples for required substance-abuse testing and presumed the test results were positive, in accordance with ADES's policy. She claims she never was afforded an alternative form of testing, and maintains that without this evidence, there was insufficient evidence to support the factual findings that are the bases for the termination of her parental rights. Relying to a large degree on *Christina G. v. Arizona Department of Economic Security*, 227 Ariz. 231, n.8, 256 P.3d 628, 632 n.8 (App. 2011), ADES contends Lisa waived these claims by failing to raise them below in a timely manner. It asserts Lisa had "at least four opportunities to either object to random urinalysis testing and/or request an alternate form of drug testing," which she never did. And, she did not object to the admission of the urinalysis evidence, although she had notice from ADES's "pre-trial statement" that it would be introducing the test results at the severance hearing.

¶7 A parent waives claims, including constitutional claims, that are raised for the first time on appeal. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008); *see also Christina G.*, 227 Ariz. 231, n.8, 256 P.3d at 632 n.8 (parent may waive challenge to ADES's reunification efforts by failing to raise issue during dependency proceedings, failing to request different or additional services, or failing to object to manner in which services provided).

¶8 Lisa testified at the severance hearing that she had "issues" with ADES's policy of regarding diluted urine samples as positive test results for drugs or alcohol. But she did not object to ADES's policy or the admission of this evidence on constitutional or other grounds, nor did she request a different form of testing for substance use. Lisa's counsel, however, raised some of the claims she is now raising during closing argument. Counsel argued,

> [ADES] would ask that you accept their policy presumption that a diluted drop is a positive drop. That's not the law. There's no law in Arizona that says a diluted drop is a positive drop. What it is is a policy decision by [ADES], because when they see a diluted drop they don't know whether or not the parent is trying to avoid detection of drugs or alcohol.
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> Now, to presume without question that a diluted drop is a positive drop, I would submit, is a violation of her rights of due process of law and her constitutional right as a protected right under the U.S. Constitution; her right to ongoing care and custody of her child; and without the ability to sort of rebut or present other circumstantial evidence, that you should not believe that.

¶9 Counsel never mentioned any rights under the Arizona Constitution, clearly waiving any such claims. And even assuming counsel had sufficiently raised a federal constitutional claim based on due process,[1] the claim was untimely raised. By raising it

[1]During argument counsel did not assert an equal protection claim. And Lisa mentions equal protection only in the heading portion of her opening brief, failing to develop it in the body of her brief. We therefore regard any such claim waived and abandoned. *See* Ariz. R. Civ. App. P. 13(a)(6) (opening briefs must present "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of

for the first time at the very end of the severance hearing, Lisa deprived the juvenile court of the opportunity to take any corrective action that might have been warranted. *Cf. State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004) (failure to lodge "specific, contemporaneous objection" deprived trial court opportunity to correct error with curative instruction); *State v. Jaramillo*, 110 Ariz. 481, 484, 520 P.2d 1105, 1108 (1974) (corrective action should be requested at earliest opportunity; waiting until action cannot be taken may be too late).

¶10 In any event, assuming the juvenile court considered counsel's argument that Lisa's constitutional rights had been violated and assuming, too, the court rejected that as a reason for denying ADES's motion to terminate Lisa's rights, Lisa has not persuaded us the court erred. She has not established her rights were violated, warranting reversal of the termination order. First, the supervised release revocation case upon which Lisa relies, *United States v. Perez*, 526 F.3d 543 (9th Cir. 2008), is distinguishable. Even assuming arguendo that a proceeding to revoke supervised release is analogous to a parental severance proceeding, there was evidence in that case the defendant's sample had been adulterated and that she was denied the opportunity to refute the test results, including the chance to cross-examine the laboratory technician who had performed the

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the record relied on"); Ariz. R. P. Juv. Ct. 106(A) (applying Rule 13, Ariz. R. Civ. App. P., to juvenile appeals); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 88, 181 P.3d 219, 242 (App. 2008) (appellate court will not address issues or arguments waived by party's failure to develop them adequately); *see also Kimu P.*, 218 Ariz. 39, n.3, 178 P.3d at 516 n.3 (argument not made before juvenile court may be waived).

analysis. *Id.* at 546-47, 550. The court in that case also made clear the result it reached was based on the peculiar facts of the case. *Id.* at 545. There was nothing here to suggest the diluted samples had been tampered with and, as we previously stated, Lisa never objected to the admission of the evidence. Moreover, Lisa had ample notice ADES intended to introduce the evidence, she was able to cross-examine ADES's witnesses, and she had the opportunity to explain the diluted urine sample. She has not, therefore, established her due process rights were violated, much less that a violation warranted denial of ADES's motion and reversal of the court's ruling.

¶11 In addition, as we previously noted, Lisa did not object to the admission of evidence regarding diluted urine samples; she only seemed to be urging the juvenile court to give that evidence little, if any, weight, given the alleged unfairness and inaccuracy of the presumption raised under ADES's policy. It was for the juvenile court, not this court, to decide how much weight to give this evidence after considering Lisa's explanations and her claims of unfairness. *See In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 545-46, 744 P.2d 455, 457-58 (App. 1987). In making that determination, the court had before it testimony regarding the reason for the policy, which was to dissuade parents from drinking large quantities of liquid or water in an attempt to flush drugs or alcohol out of their system and avoid detection. Additionally, CPS case manager Brooke Bjorneberg testified she had advised Lisa early in the dependency that any missed urinalysis testing or diluted samples would be regarded as a positive result for drugs or alcohol. And Bjorneberg talked to Lisa about the diluted samples she had provided,

suggesting to her that she limit or keep track of her fluid intake, stressing the importance of avoiding diluted samples.

¶12 The juvenile court also had before it Lisa's admission at the severance hearing that she had understood a diluted sample meant it contained "too much liquid in the urine." She knew ADES would view diluted samples, like missed tests, as positive for substances. She denied drinking alcohol or taking illegal drugs on the days she had submitted diluted urine samples, and she implicitly denied hydrating her body for the purpose of diluting any drugs or alcohol in her system. She explained to her case manager she had drunk a lot of water because it had been hot and she had to ride the bus. But, as Bjorneberg pointed out, only one of the numerous diluted samples had been collected during the summer.

¶13 It was for the juvenile court to assess the evidence, resolve any conflicts, and decide how much weight to give the testimony, including the testimony about diluted urine samples and the inferences that ADES had drawn from them. *See Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205. We will not reweigh the evidence or substitute our judgment for that of the juvenile court. *Id.* ¶ 12. In making that decision, the court could accept or reject Lisa's explanations and take into account her claim that ADES's policy was unfair. Finally, the court had before it evidence that during almost two years of urinalysis drug testing, Lisa had submitted eleven diluted samples, and only one had been provided during the summer.

¶14 Moreover, the juvenile court made other factual findings in its thorough minute entry order that independently supported the termination of Lisa's parental rights: J.M. had been out of the home pursuant to court order for a cumulative period of fifteen months or longer, ADES had made a diligent effort to provide appropriate reunification services by providing a variety of services, Lisa had been unable to remedy the circumstances that had caused J.M. to be in that placement, and there is a substantial likelihood she would not be capable of exercising proper and effective parental control in the near future. *See* § 8-533(B)(8)(c). The court also found Lisa had been compliant with "multiple tasks and services set forth in her reunification case plan," but had tested positive for opiates during periods for which she had not provided prescriptions, she had been substantially non-compliant with her substance-abuse treatment in February 2013, and the court anticipated her abuse of drugs and alcohol would continue for a prolonged, indeterminate period of time.[2] The court noted Lisa's own testimony that as far as she could recall, she had last used alcohol just a few months earlier, admitting she had lost track of the date she last drank alcohol. The court also observed Lisa had stated she "no longer consider[ed] herself an alcoholic" because she did not have a desire to drink, and

[2]Although this finding directly relates to the termination of Lisa's rights on the ground of chronic abuse of drugs and alcohol, under § 8-533(B)(3), the facts supporting the two grounds for termination render them necessarily interrelated. As the juvenile court's ruling reflects, it found that chronic substance abuse, instability with housing and employment, and repeated incidents of domestic violence, had all resulted in the removal of J.M. from the home before the first dependency proceeding and had prompted ADES to file the second petition, and were the reasons the child remained out of the home and in court-ordered care under § 8-533(B)(8)(c).

she admitted at the severance hearing that the longest period during which she had sustained sobriety was "several months."

¶15 The juvenile court further noted the history of domestic violence between Lisa and J.M.'s father and Lisa and her boyfriends, Lisa's lack of a stable source of income, and the testimony about her destructive and violent relationships with men. And, as the court had found at the permanency hearing, at no point during the dependency could J.M. safely be returned to either parent without exposing him to "a substantial risk of harm to his mental, physical or emotional health and safety." That fact had not changed by the time of the severance hearing. Because there was reasonable evidence to support these factual findings, we adopt the ruling. *See Jesus M.*, 203 Ariz. 278, ¶¶ 4, 16, 53 P.3d at 205, 207-08, *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). And, because there was sufficient evidence to support the termination of Lisa's rights pursuant to § 8-533(B)(8)(c), we need not address her separate argument that there was insufficient evidence to support the court's termination of her rights on the ground of chronic drug and alcohol use. *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205.

¶16 We also reject Lisa's claim that there was insufficient evidence to support the juvenile court's conclusion that termination of her parental rights was in J.M.'s best interests. She focuses on evidence of her compliance with the case plan, her successful completion of many required programs or courses, the changes she had made in her life, and her purported sobriety for the few months preceding the final termination hearing.

She further emphasizes her desire to reunite with J.M., his similar feeling about rejoining her, and the strong bond between them.

¶17 Before terminating a parent's rights, the juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and that a preponderance of the evidence establishes termination of the parent's rights is in the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 22, 41, 110 P.3d 1013, 1018, 1022 (2005). To establish termination of Lisa's rights was in J.M.'s best interests, ADES was required to show the child "would derive an affirmative benefit from termination or incur a detriment by continuing in the relationship." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004). Among the factors relevant to this determination is whether a current plan for the child's adoption exists. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004). The juvenile court also may consider whether the current placement is meeting the child's needs. *See In re Maricopa Cnty. Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994). And, it may take into account that "[i]n most cases, the presence of a statutory ground [for termination] will have a negative effect on the children." *In re Maricopa Cnty. Juv. Action No. JS-6831*, 155 Ariz. 556, 559, 748 P.2d 785, 788 (App. 1988). Lisa asserts the only benefit J.M. will derive from the termination of her parental rights is permanence, which she insists is not sufficient. We disagree.

¶18 The juvenile court's minute entry order reflects it carefully considered the various factors and found there was a clear benefit to J.M. in terminating Lisa's rights. It noted J.M. has special needs and is in a "licensed foster home, committed to providing a safe, nurturing and permanent home," where he had been for over a year, and that the foster parent with whom he is bonded is interested in adopting him. The court acknowledged and made clear it had considered the fact that Lisa and J.M. are bonded to one another and that J.M. would like to be reunited with his mother. Nevertheless, after balancing all of these interests, the court concluded termination of Lisa's parental rights was in J.M.'s best interests. Again, we will not reweigh the evidence, which is essentially what Lisa is asking us to do. Rather, finding sufficient evidence to support the court's findings and conclusions, we adopt this portion of the ruling as well.

¶19 For the reasons stated herein, we affirm the juvenile court's order terminating Lisa C.'s parental rights to J.M.

/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