IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ASHLEY R.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND A.B.,
Appellees.

No. 2 CA-JV 2019-0158
Filed May 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20180230
The Honorable Alyce L. Pennington, Judge Pro Tempore

AFFIRMED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Tom Jose, Assistant Attorney General, Mesa
Counsel for Appellee Department of Child Safety

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By Edith Croxen
Counsel for Minor

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Ashley R. appeals from the juvenile court's order terminating her parental rights to her son, A.B. (born April 2017), on the ground of neglect. *See* A.R.S. § 8-533(B)(2). She argues there was insufficient evidence to support the court's findings that she had neglected A.B., and that termination of her parental rights is in his best interests, and contends the Department of Child Safety (DCS) did not provide adequate reunification services. She also argues Arizona's "scheme for termination of parental rights" is unconstitutional. We affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12 (App. 2007). In April 2018, DCS implemented a safety plan for Ashley, A.B., and his father, Andrew C., after it received reports of domestic violence in the home and that Ashley was leaving A.B. in Andrew's care despite his mental-health issues, drinking, and drug use. That plan included an in-home safety monitor selected by the parents and a day care referral for A.B. A.B. was removed from their care, however, after Ashley refused to enroll A.B. in day care and hesitated to engage in services, the safety monitor declined to continue to participate, and Andrew continued to smoke marijuana in the home.

¶3 DCS filed a dependency petition in May 2018 and A.B. was found dependent as to both parents in June 2018. A.B. was returned to their care in December 2018. The parents understood they would enroll A.B. in day care and that he would not be left with Andrew full time. A.B. was removed from the home in February 2019 after DCS learned that A.B. was not in day care and Andrew was taking care of him but was not taking his medication and was smoking marijuana in the home. There were also indications of domestic violence. The day A.B. was removed, Ashley had

left him in Andrew's sole care despite Andrew having told her he could not care for A.B.

¶4 In July 2019, DCS moved to terminate Ashley's parental rights on neglect and mental-illness grounds. After a contested hearing, the juvenile court concluded DCS had shown termination was warranted on the ground of neglect and found termination was in A.B.'s best interests. This appeal followed.

¶5 To sever a parent's rights, the juvenile court must find clear and convincing evidence establishing at least one statutory ground for termination and a preponderance of the evidence that terminating the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 32, 41 (2005); *see also* A.R.S. § 8-863(B). We do not reweigh the evidence on appeal; rather, we defer to the juvenile court with respect to its factual findings because it "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶¶ 4, 14 (App. 2004). We will affirm the order if the findings upon which it is based are supported by reasonable evidence. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002). We view that evidence in the light most favorable to upholding the ruling. *See Christy C.*, 214 Ariz. 445, ¶ 12.

¶6 Ashley first argues that the juvenile court erred in finding she had neglected A.B. Termination is warranted under § 8-533(B)(2) if a parent has neglected a child. A parent neglects a child when that parent is unable or unwilling "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." A.R.S. § 8-201(25)(a).

¶7 Ashley contends the juvenile court erred in identifying as a basis for its neglect finding the fact that she had left A.B. with Andrew because A.B. had been returned to her care "without any restriction on Father's ability to parent A.B. by himself." This argument ignores the record, which shows that Ashley understood that Andrew was not an appropriate caregiver for A.B. and that A.B. should instead be enrolled in day care.

¶8 Ashley further asserts the juvenile court erred in identifying A.B.'s exposure to domestic violence as supporting its finding that she had neglected him. She asserts that exposure to domestic violence does not constitute neglect, but instead constitutes abuse, requiring the state to prove

A.B. had been diagnosed with a "serious emotional injury" pursuant to § 8-201(2) before it could support termination. We disagree. Although an emotional injury would demonstrate abuse, the decision to allow a child to be exposed to domestic violence also demonstrates a parent's failure to adequately supervise the child.[1] Viewed in conjunction with Ashley's decision to leave A.B. in Andrew's care, the juvenile court's neglect finding is supported by the record.

¶9 Ashley next argues that DCS "failed to make reasonable efforts" toward reunification. No statute requires DCS to make diligent efforts to provide reunification services before a court may sever a parent's rights based on neglect, however, and no Arizona court has found such a requirement.[2] In any event, because Ashley did not raise this issue below or object to the juvenile court's repeated finding that DCS was making reasonable efforts to unify the family, we decline to address this issue further. *Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶ 16 (App. 2014) (parent who fails to object to the adequacy of services, however, waives review of the issue).

¶10 Next, Ashley contends that "[t]ermination was not in A.B.'s best interests." She first asserts that the juvenile court said "nothing about the bond" between Ashley and A.B. But we presume the court considered the evidence before it, even if not specifically referenced in its findings. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004). Ashley also asserts that

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[1]For the first time in her reply brief, Ashley seems to argue that, if exposure to domestic violence constitutes neglect, then the definition of neglect would "engulf[]" other bases for termination. Ashley cites no authority, however, for the proposition that the bases for termination are exclusive such that a parent's conduct must support termination only under one provision.

[2]We have determined that, before terminating a parent's rights on mental-illness or substance-abuse grounds the state is constitutionally obligated to make reasonable efforts to preserve the family. *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 16 (App. 1999); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 32 (App. 1999). We also imposed that requirement on termination based on previous terminations under § 8-533(B)(10). *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 15 (App. 2004). We declined to apply it, however, to termination based on abandonment. *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, ¶ 15 (App. 1999).

adoptability is an insufficient basis for a best-interests finding. Our supreme court has said otherwise. *See Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶ 13 (2018).

¶11 Ashley additionally argues the statutory scheme is unconstitutional because it requires only a preponderance of the evidence that termination is in a child's best interests and, additionally, it "shifts the burden of proof" and "fails to provide adequate safeguards to ensure that the juvenile court gives weight to circumstances favoring the parent."[3] Ashley's challenge to the statutory scheme consists of facial and as-applied challenges "to the manner in which" our supreme court's decisions in *Kent K.* and *Alma S.* "shift the burden of proof and lessen the burden of proof in a best-interests inquiry." We are required, however, to follow the decisions of our supreme court. *See City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378 (App. 1993) (court of appeals has no authority to overrule, modify or disregard supreme court). And in doing so, we are constrained by the court's conclusions in *Kent K.* and *Alma S.*, both express and implied. We are therefore bound to reject Ashley's constitutional claims.

¶12 We affirm the juvenile court's order terminating Ashley's parental rights to A.B.

[3]As Ashley acknowledges, she did not raise these arguments below. Although Ashley cites no authority requiring fundamental-error review in these circumstances, our supreme court has stated that fundamental-error review is appropriate when a parent fails to first raise a constitutional claim in the juvenile court. *See Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, ¶ 37 (2018).